UNIVERSITY OF TORONTO

3 1761 00863540 1

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

I

40

893

**ON JURISPRUDENCE
AND
CONFLICT OF LAWS**

OXFORD UNIVERSITY PRESS

LONDON EDINBURGH GLASGOW NEW YORK

TORONTO MELBOURNE CAPE TOWN BOMBAY

HUMPHREY MILFORD

PUBLISHER TO THE UNIVERSITY

ON
JURISPRUDENCE
AND THE
CONFLICT OF LAWS

by

FREDERIC HARRISON

of Lincoln's Inn, M.A. Oxon.

D.C.L., Litt.D., LL.D.

WITH ANNOTATIONS

by

A. H. F. LEFROY

M.A. Oxon., of the Inner Temple, Barrister-at-Law

Professor of Roman Law and Jurisprudence, University of Toronto

OXFORD
AT THE CLARENDON PRESS

1919

153690
23/12/11

P R E F A C E

THIS volume contains the five Lectures given by me as Professor to the Inns of Court, and published in the *Fortnightly Review* in 1878 and 1879. They have now been revised by me, and they are followed by ANNOTATIONS by my friend Professor A. H. F. Lefroy, of the University of Toronto. In 1877 I was appointed by the Council of Legal Education as Professor of Jurisprudence, International Law, Public and Private, and of Constitutional Law, in conjunction with the present Viscount Bryce, O.M.; and I lectured regularly in the Middle Temple Hall during the twelve years from 1877 to 1889. The later years of my term of office were chiefly occupied by Lectures on Public International Law and on Constitutional Law. Professor James Bryce undertook the entire field of the Civil Law of Rome. I may here note that in 1882 I published in the *Fortnightly Review* two Lectures on the Law of Treason.

I have long known that the Five Lectures contained in this book were much used by students in various Colleges and Halls and in the University of Oxford; and my friends Sir Thomas Erskine Holland, K.C., Albert Dicey, K.C., and others advised me to re-issue them in a substantive volume. But the other large subjects included in my office left me no leisure to revise these five Lectures. And in 1889 I became absorbed in public office and literary work, and I allowed the Lectures to remain in the form of Review articles.

Recently Professor Lefroy, of the University of Toronto, informed that he was using the Lectures in his Classes and

it was desired to have an adequate re-issue of them. I thereupon placed in his hands the publication of them, on condition that he would add all needful explanations, references, and notes—in fact, would bring them up to date in accordance with present legal learning. Having long ceased to study the later literature of Jurisprudence or recent text-books, and having now entered on my eighty-eighth year, I entrust the task with entire confidence to Professor Lefroy.

It will be remembered that the whole of these five Lectures were delivered and published just forty years ago, and they are based on the books then current and reflect the views of that day. But as they are almost entirely historical, it does not seem to me that subsequent authorities have displaced or superseded them. What is needed in the way of reference to recent books will be found in the Annotations of my colleague. I am aware that my suggestion of a new name for Private International Law has not been accepted by some eminent authorities. But their criticism has not convinced me, and, as the discussion it aroused was a fact in legal history, I allow it to remain here without further argument.

F. H.

BATH, *October* 1918.

CONTENTS

	PAGE
PREFACE	5
CHAPTER	
I. AUSTIN AND MAINE ON SOVEREIGNTY	9
II. AUSTIN'S ANALYSIS OF LAW	37
III. THE HISTORICAL METHOD	71 X
IV. THE CONFLICT OF LAWS. I	98
V. THE CONFLICT OF LAWS. II	125
ANNOTATIONS. BY PROFESSOR LEFROY.	149

ON JURISPRUDENCE AND CONFLICT OF LAWS

CHAPTER I

AUSTIN AND MAINE ON SOVEREIGNTY

(i.)

THE analysis of our primary ideas in law which was finally reduced to method by John Austin exactly ninety years ago, still remains to Englishmen the foundation of rational jurisprudence. But it is desirable to get rid of a great deal of exaggeration with which his work has been surrounded. The theory of Austin contained little that was in any sense new; it may be reduced to a small number of very simple propositions; and the truth of these propositions has been asserted in much too absolute a way.

The value of his analysis has been obscured, and the mind of the student is perplexed, by everything which prolongs this exaggeration. There is not the least ground for regarding the analysis as a purely original discovery, much less as forming a new epoch in political philosophy. Again, Bentham and Austin were driven by the conditions of their time into endless repetitions and criticisms which have now become simple encumbrances. And they fought tenaciously for a scheme of moral philosophy which is no longer the critical battle-field it was. Putting aside the parts of the 'Province of Jurisprudence' which are purely combative, and the parts which belong rather to general or to moral philosophy, the residue is capable of being stated in a few plain doctrines. But these doctrines, if few, are of fundamental importance. And the frame of mind which they encourage is perhaps of more importance than the actual

dogmas in themselves. For when we come to test them by the light of all that we have learnt in these ninety years we find that they depend for their truth on assumptions which are very far from being universally true in fact; and they require qualifications which very much reduce their scientific completeness as social laws.

The history of the famous analysis of sovereignty, political independence, law, sanction, and forms of government, which Austin has made so familiar to us, is a subject of some interest. Austin has reduced all these notions to their complete form; but it is well known that he did not discover them. His true merit is that he seized firm hold of these notions as the foundation-stones on which a strict jurisprudence must rest; and then he kept a tenacious grip on the definitions themselves with a marvellous consistency of hold. What lies in Bentham and Hobbes imbedded in a mass of moral and political discussion stands out in Austin clear cut like the proposition at the head of a problem in geometry. But no one can deny that all the essential features of this dissection of sovereignty, law, political independence, and sanction, are to be found in Bentham, and in a far more distinct form in Hobbes. It has always been assumed that Hobbes (who is so often mentioned and quoted by Austin) was the original author of this method of thought. So far as England is concerned, he probably is. But substantially the same ideas are found in a much earlier foreign writer, whose influence on European, and indeed on English, thought long remained paramount in that sphere: one whom it is clear that Hobbes had not only read, but had assimilated. This man was the great French lawyer and politician of the sixteenth century.

John Bodin is usually regarded on the Continent as, with Machiavelli, the founder of modern political philosophy. Bodin was a lawyer of the great law school of Toulouse, who

rose to office and trust in the court of Henri III of France, and came to England as the adviser of the Duke of Alençon when he was here to sue for the hand of Queen Elizabeth. Bodin's work *On the Commonwealth* was published in French in 1577, in Latin in 1586 under the title *De Republica*, and in an English translation in 1605. There are not two opinions as to the originality and power of its reasoning, as to the profusion of learning and historical observation with which it is stored, or as to the vast influence which it exercised for at least a hundred years, until the works of Hobbes and of Locke somewhat superseded it. Mr. Hallam,¹ who compares Bodin with Aristotle and Machiavelli as a political philosopher, tells us that he and Montesquieu 'are, in this province of political theory, the most philosophical of all those who have read so deeply, and the most learned of all those who have thought so much'. With the political philosophy of Bodin we have now nothing to do; but it is impossible to read the *De Republica* without seeing how thoroughly the ideas of Hobbes as to sovereignty, political independence, law, and the normal types of government, had already become the common property of political thinkers. Those who rate at the highest the philosophical genius of Hobbes can still admit that in the juristic questions before us the relation of Hobbes to Bodin is even closer than the relation of Austin to Hobbes. Germs of these ideas undoubtedly appear in the discourses of Machiavelli; but it is not easy to trace them in Machiavelli in a very definite shape, nor do I know of any original of earlier date.

A few quotations will show how closely Bodin came to those notions of Hobbes about sovereignty and law which Bentham and Austin subsequently popularized. In the eighth chapter of his first book Bodin undertakes to

¹ *Literature of Europe*, vol. ii, c. iv.

analyse the idea of sovereignty, or *maiestas*, as he calls it in his Latin version. The essence of this he makes to be 'an absolute power, not subject to any law'. 'The chief power', he says, 'given unto a prince with charge and condition is not properly sovereignty, nor power absolute.' Here appears Hobbes's aversion to limited monarchy. Bodin then describes the sovereign power as subject to no law but the law of God and of nature, and he gives as the tests and attributes of sovereignty the same general marks that Hobbes gives; all of them, he says, being summed up in the power to give laws to all subjects, and to receive none from them. 'All the force of law and of custom lieth in the power of him that hath the sovereignty in a commonweal,' and 'all the marks of sovereignty are contained in this, to have power to give laws to all and every one of his subjects, and to receive none from them.' He then very sufficiently treats of the question that no subordinate power, however powerful, can be sovereign, nor can any authority less than the supreme authority of an independent political community. The sovereignty again, he shows, may reside either in a single monarch, or in an aristocracy, or in a sovereign people.

This famous tripartite division of states was originally propounded by Machiavelli; but Bodin has worked it out more fully, and his language curiously accords with that of Hobbes. Bodin then gives an analysis of law, which, he says, is, 'The command of the sovereign concerning all his subjects in general or concerning general things' (the '*or*' here shows a breadth of grasp, indeed a divergence from the view of Austin). *Law*, he says, 'carryeth with it either reward or punishment'; and *custom* he rightly explained to depend on the sovereign and to owe its force to the confirmation by the sovereign; the power of the magistrate being also a delegated authority. In his words, 'The magistrate next unto the sovereign prince is the principal person in

the commonweal, and he upon whom they *which had the sovereignty discharged themselves*; communicating unto him *the authority, force, and power to command.*'

Now here we have, at any rate in outline, the theory of Hobbes as read in his *Leviathan*, or the *De Cive*; and at least the germs of the famous analysis of Bentham and Austin. We have the firm grasp on the idea of sovereignty as an unlimited power, itself free from law and the source of law, variously distributed in the body politic; the body politic as essentially *independent* of all external control whatever; *law, custom, and judicial authority* as having a power by delegation or implied assent of the sovereign power; *law* as being a command of the unlimited sovereign power imposing on the subject body some general rule, and as implying in itself a *sanction*—such sanction being either *reward* or *punishment*, which was Bentham's idea. And, curiously enough, the treatise opens with something very like Bentham's principle of Utility, as where he asks, 'What is the object of the political society?': he replies, 'The greatest good of every individual citizen, which is the same as that of the commonwealth.'

The history of these ideas is not difficult to trace. When Bodin came to England in 1581, he found his work in such repute that it was taught in London and in Cambridge; and at his death, in 1595, his system was the one which dominated the political thought of Europe. Spinoza, Hobbes, and all the exact and profound thinkers followed him; and the natural tendency of his severe logic was to strengthen the parties who favoured absolutist theories and that imperialist spirit which played for a century so great a part in the history of European politics. The inevitable reaction followed in the metaphysical conception of a law of nature, anterior, and as it were superior, to the positive law of sovereign authority. This idea had been in terms admitted

by Bodin and Hobbes, but in such a way as practically to absorb and supersede any law of nature.

At the head of the other school stood Grotius, whose anti-absolutist theories were expanded by Locke and the republican school. It is obvious that this recourse to a fictitious law of nature was merely a metaphysical expedient to get some sanction to a legitimate resistance to absolute authority. And however useful or efficient in practical politics this theory may have been as a weapon, it was fatal to any strict reasoning in the analysis of sovereignty and law. Under the loose methods of argument, and the recourse to 'the reason of the thing' and to 'natural justice', which were inevitable in this philosophy, the stricter logic of Bodin and Hobbes was lost sight of, until the constructive genius of Bentham seized on the mighty resource of a conception of sovereign authority unlimited in power of legislation, and itself anterior to and superior to all law: and finally the dry dogmatism of Austin found a congenial material in the passionless analysis of facts which Hobbes had cast into so hard and abstract a form. Such was the origin of the Austinian analysis. But there was no time when the abstract analysis of social force on which it rests in the pages of Bodin was ever without a regular succession of adherents, or during which it failed to exercise an influence over the thoughtful minds of Europe, and that long after Bodin himself had ceased to be read, and the theory had ceased to be ascribed to him.

Though we may get rid of the exaggeration which supposes Austin to be the original discoverer of his legal analysis, we must beware of undervaluing his remarkable achievement. He is plainly the first Englishman who detached these general ideas from an elastic political philosophy, or from Utopian schemes of reform. In Austin English law found the first clear conception of an abstract

jurisprudence; that is, a methodical examination of the general language of the law. Though he occasionally wanders in his first six lectures into moral philosophy and the theory of politics, in the main his lectures deal with law alone in the spirit of a lawyer. His next great merit is to have detached for purposes of study rules of positive law from moral philosophy and from all general political theorizing. It seems to us so easy to keep ethical and legal ideas distinct that we are apt to wonder what merit there could be in insisting on the line of demarcation. Now that the work is done, and the notion is a familiar commonplace, it seems easy enough. But it was not altogether easy at all times. Under the influence of the theory of the law of nature (indispensable as that theory no doubt was to make head against theocratic and absolutist dogmas) there was a constant tendency to base law either on moral justice or upon natural equity as the reputed parent, or source, or corrector of law. No man of that age ever attempted to generalize about law or its sources without at once breaking into pompous and elastic platitudes. The problem was this: how to get high abstract theories of the underlying conceptions in law without wandering into metaphysical commonplace? And this problem Austin solved. He insists, *usque ad nauseam*, that positive law as enforced in courts of justice (and positive law alone) is his subject; that positive law he traces up to its source in the unlimited sovereign authority of an independent body politic. Law, he says, rests for its title on the unlimited authority of the sovereign in every state to legislate for all citizens of its own community. That unlimited sovereign power is with him an ultimate fact. The form, monarchic, aristocratic, or democratic, is not his concern. Beyond that he will not be dragged: how it came into being is the business of the

historian, not of the jurist. Law is what that sovereign commands by sanctions; and that which has no legal sanction is not law.

But then, he says, taking positive law as an ultimate fact, we can analyse its elements and strictly define its leading conceptions, resources, and distinctions. And this he proceeds to do. It is quite true that in so doing he himself digresses into long and tedious discussions about the law of nature and the law of God: the principle of utility, and the test of morality. All this is perfectly beside his own avowed method, and I think in itself almost worthless. But the current of ideas was too strong for him. He found everybody around him bent on discovering a basis for law in the law of nature or the law of God. He himself insists that law rests on the command of the sovereign. But withal he wastes precious energy in trying to show that the legislator should always be animated by the principle of utility; and then that the principle of utility will always conform to the law of God, and in any rational use of the term to the law of nature. All this disquisition is needless for his theory, besides being, I think, perfectly idle. But perhaps it was too much to expect an Englishman, thinking upon law in the reign of George IV, to say boldly that law meant the rules which the legislature authorized its tribunals to enforce; and that what the legislature enforced must be obeyed. It was inevitable that a reasoner seeking to impress these two ideas on his time should fall back on the logic of Hobbes, who coldly said, 'No law can be unjust'. But the horror which for two centuries this maxim excited forced Austin to clothe the unpopular truth in a long digression about the principle of utility, in order to show that there was nothing cynical in what he propounded.

It would be an interesting line of inquiry to seek how it came about that so much difficulty was in fact experienced in dissociating ethical from legal ideas, and why for centuries men shrank back from the very simple proposition that *law* is what the tribunals of the sovereign enforce on all men, simply as having sovereign authority; and that law must be obeyed simply because it is law—that is, enforced by penalties. Of course, during all these centuries, law was enforced as a fact, and men obeyed it in fact without a murmur; but they could not be brought to say so, at least not in solemn and thoughtful trains of reasoning. The reason, I think, is to be looked for in the history, and especially in the religious history, of Europe. In the mediæval time there had been a variety of vague theories underlying the curious problem presented to thoughtful minds by the question, Why should men obey the law? Partly, it was said, the law was contained in Revelation, and based on the will of God and the voice of the Church. Again, it was said that law rested on a vague authority of infinite custom going back to the Roman Empire. Or again, the absolute and divine authority of princes was asserted as a sufficient authority.

But at the Reformation and the religious wars, and the wars against monarchy, all these bases gave way; the Roman law became more and more inadequate for modern civilization; it entirely failed as a basis of English or even French and German common law; the theological basis became less and less sufficient, and the prevailing tone was one of resistance to any antecedent right in princes. Nor did the idea of any paramount right in the people satisfy men's minds any better. In this unsettled state of things, for at least two centuries, there was a continual effort to clothe law and judicial authority with a moral or metaphysical dignity, to compensate it for the divine

or imperial dignity which it seemed to have lost. Men who fiercely repudiated the claim that the law of the land was based either on royal prerogative or divine revelation were eager to believe and persuade mankind that it was based on a natural and eternal justice anterior both to prerogative and to revelation. And both sides, whether republican zealots or sacerdotal absolutists, were equally prone to mix up in one spiritual and temporal power; both sought to use the sword of justice to enforce their own moral ideas, and claimed for their own decrees the sanction of paramount moral right. Hence, for nearly two centuries, all general statements about law involved an inextricable confusion with ethics. It was not until the intellectual battles which led up to, and led down from, the great French Revolution, that the simple idea of social utility began to seem adequate as a basis for law and as an object for legislation.

Bentham's principle of utility was nothing but the recognition of the truth that social well-being is a motive sufficient in itself, whether for the legislator in making the law, or for the citizen in obeying the law. This grand, simple, but somewhat late conception of human society had long, in truth, animated in this country, as in other countries, the political reformers of the age, both before and after the explosion of 1789. And under cover of that dominant school of ideas, Austin at last took heart to propound the simple doctrine which had so scandalized our forefathers: that law, if it is to be understood, must be kept free from morals; that the bases and sanctions of law and morals are, for logical purposes, totally distinct; and that, if we try to carry the authority of law to any higher and ulterior ground than the will of a sovereign legislature, it simply ceases^s to be *law*. In the language of modern philosophy, law belongs to the sphere of the

temporal power. If we seek to give law a spiritual (or moral) foundation, we constitute a court of appeal over the highest magistrate, and we weaken the temporal efficacy of the law. The citizen becomes a law to himself, or some other authority than the judge becomes a law to him. In either case he tends to weaken his obedience to law.

Now these propositions, which seem to us ordinary truisms, were anything but truisms when they were first insisted upon; and truisms or not, I cannot but think the assiduous reiteration of them by Austin is of the highest possible value to the student who is fresh to law. As a rule, he comes to the study of law from some systematic education in moral and philosophical problems. His almost inevitable inclination is to assume some kind of ethical clue to law, and to attempt to generalize in law by the same logic and in the same spirit in which he has generalized in philosophy. In ethics and in metaphysics authority does not go for much, and a training in ethical and in metaphysical learning is too often the art of remembering which philosopher contradicted this or that philosopher, and in what particular part of his theory. Now in *law* authority is everything, and the reason of the thing, or philosophical probability, is nothing. There is no greater snare to the young lawyer than a proneness to reason by analogy, or to reason by any imagined standard of justice, that is to say by the light of nature. *Ita scriptum est* is the Decalogue of the jurist. Principle there is, analogy there is, and a very elaborate system of logical method. But it is a legal principle, a legal analogy, and a legal logic. There is nothing about it at all akin to ethical or philosophical reasoning. It is to be acquired by long practice and a refined sense of general rules underlying varying accidents. But law is almost as distinct from ethics as political economy is distinct. And there is nothing which

can so brace up the mental fibres of the student familiar with ethical and philosophical methods as to be plunged into the cold bath of Austin's clear but frigid reiteration of the truth that law means nothing but what the tribunals enforce by the delegated authority of sovereign power, and that nothing not so enforced is of account in law.

It was natural that the clearest and most logical assertion of this doctrine should come from an Englishman. The England of the eve of the first Reform Act, the profession of Mackintosh and Romilly and Brougham, formed exactly that mental atmosphere where ideas of any vague judicial prerogative were lowest, and ideas of the summary omnipotence of Parliament were highest; where the letter of the King's printer's statutes and of the cases in the authorized reports seemed to be of quite boundless authority; and where the idea of treating as law what had not been recorded in express words or formally promulgated as law, had most utterly receded out of sight. Everywhere on the Continent there is at times visible a tendency to refer law to the unexpressed will of a sovereign ruler, or to some sublime dictates of eternal justice, or to the paramount rule of public safety. To an English lawyer a case or a statute grows to be the one, final, and all-sufficient appeal and test of law. To the English publicist, Parliament presents a phenomenon of power without limit in the range of its capacity and the irresistibility of its force.

It is unfortunate that this valuable delimitation of the province of law has been mixed up by Austin with a mass of the very matter from which it was his special business to extricate law. But considered from the point of view of the mere jurist the propositions in Austin's first six lectures may be reduced to a few very plain definitions and a small body of argument in support. For this purpose we may neglect almost everything contained in the six

lectures, excepting the first, the fifth, and the sixth. The second, third, and fourth are almost wholly occupied with what is matter of ethics or of political philosophy. And the reasoning of the first, fifth, and sixth lectures might now be put into much fewer pages. There is no longer (thanks to Austin himself) any danger of confusing moral and legal obligation. No one needs any justification for giving an obedience to the decrees of courts of justice, or doubts that the sovereign legislature can make anything law which it chooses to enforce. No one now attaches any distinct meaning to the vague rhetoric of Blackstone about obeying the law of God when it conflicts with the law of man, or to the slipslop of Ulpian about the law of nature common to men and animals. The work is done; and therefore it is most unfortunate that Austin's clear assertion of the province of law should still be administered to the student encumbered with so much irritable iteration about the muddiness of Blackstone, and so much needless discussion about the principle of Utility.

It being conceded that Blackstone wrote and thought in the age of vague commonplace about the ultimate sanction of law and of mysterious veneration of the British constitution, it is to be regretted that Austin should fill the mind of the beginner with contempt for a work like the *Commentaries on the Laws of England*, which is not only in itself a masterly work of art, but is still the only available attempt to cast into a literary form a comprehensive panorama of English law as a whole. Austin was absorbed in keeping his grasp with rigid tenacity on certain coherent conceptions. Blackstone was occupied in arranging the complex labyrinth of English law into such an artistic composition as should at once impress the imagination of his lay readers. And this he has undoubtedly succeeded in accomplishing—and he alone has succeeded. Again, as

a practical lawyer, he has, I think, adhered to a scheme of arrangement which, for real convenience, will probably outlast the efforts of analysis to recast. In the same way Austin's book is, to my mind, disfigured by violent attacks on men like Montesquieu and Hooker, whose purpose was a totally different one from his, who were not considering the *law* of the law courts at all, and whose very object it was to draw attention to the close analogy between the *order* enforced by positive enactments and physical penalties, and the *order* which rests only on the force of moral sanctions and public opinion.

(ii.)

When we subtract the invective, now needless, and the excursus into ethics and the like, the first six lectures of Austin rest on a simple ground, and will go into a very moderate compass. If we reduce them to a practical form, divesting them of their highly abstract shape, and thinking only of their utility to the beginner in law, they amount, I believe, to something like the following principles and maxims:—

In every legal inquiry, the primary necessity is to determine the limits of the sovereign authority by which any legal obligation is created. That is equivalent in practice to the question of jurisdiction as a preliminary.

The sovereign authority is determined when we ascertain the definite superior in any independent political society which, as a fact, is habitually obeyed by the bulk of the community, and does not itself obey any higher authority. That amounts to saying that the obligation to obey the laws of a community rests on *de facto* authority of the power for the time being actually supreme, and habitually exercising the physical police.

We ascertain what is an independent political society

when we find the limits and extent of that society which is free from any superior without it, and receives orders from no authority outside of it. That is to say, that we must separate all subordinate authorities from the supreme authority, until we reach back to the ultimate superior which gives, but never receives, commands.

That supreme authority in every independent community is, *for the purposes of the lawyer*, regarded first as determinate; and then as of absolute, that is, of unlimited power. There is a popular saying which is equivalent, 'An Act of Parliament can do anything except make a man a woman'. That is to say, the only limits to the absolute power of the legislature lie outside of law altogether; in the case supposed, they are physical. Of course, there are also moral, political, and even international limits to the absolute power of the legislature; and there may be, as matter of history, politics, or political philosophy, no determinate sovereign. But there are no limits to the absolute power of the sovereign within the range of *municipal law*; or in other words, *to the lawyer*, there are none. And, *to the lawyer*, there is always a determinate sovereign.

Law, for the purposes of the lawyer, is a species of command issued by such a political supreme authority to its political inferiors or subjects habitually obeying it. Nothing that is not a *command* is *law*; and nothing commanded by anything but the supreme authority, as already defined, is law. ✓

The *command* is the expression of a desire by the sovereign, or supreme authority, that the subject shall do, or abstain from doing, certain specified acts, or shall recognize a specified line of conduct. ✓

But the simple expression of a wish is not enough to make a law. It needs a *sanction*. That is, there must be some evil which the supreme authority will inflict on the subject in case of neglect to observe the wish so expressed.

Nor is it sufficient that it should be a simple act to which the command relates. The command must be to do, or to abstain from, *acts of a class*.

When this *command* is duly accompanied with a *sanction*, or penalty for neglect to observe it, a *legal obligation* or duty lies on the subject to obey the command and to observe the rule.

If the legal obligation, or primary obligation, is violated, the liability of the sanction then arises, and is called a secondary obligation, or liability to punishment.

These few propositions seem nearly all of solid principle established in the first six lectures of Austin as to the analysis of sovereignty and of law. Summing up the steps in the process they may all be comprised in two propositions.

(i) The source of all positive law is that definite sovereign authority which exists in every independent political community, and therein exercises *de facto* the supreme power, being itself unlimited, as a matter of fact, by any limits of positive law.

(ii) Law is a command relating to the general conduct of the subjects, to which command such sovereign authority has given legal obligation by annexing a sanction, or penalty, in case of neglect.

Now these propositions are in themselves perfectly simple and almost obvious. They follow from the careful statement of the terms employed; and are only not truisms because they have been so very confusedly conceived in other authors. The value of them to the student of law is this. The proposition or propositions as to sovereignty force on his attention that law is self-contained; that it draws a hard and fast line between all that is law of the land, and all that is without that line. In law there is no ambiguous zone, no no-man's law, as there is in morals and

the like. Law is perfectly unaccommodating and rigid, as passionless and inexorable as a phenomenon in nature. The lawyer has nothing to do with hard cases. Bad law to him is not inequitable law (to him in his own science there is no such thing), but bad law is a rule falsely supposed to be law. His sole and ultimate standard of good law is the formal command of sovereign force supposed to be irresistible and unlimited.

It is somewhat singular that Austin rather inverts the order in which the analysis of law and sovereignty are taken by him; and we have intentionally transposed them, speaking first of sovereignty and then of law. I know no sufficient reason why Austin should deviate from the natural order, the order followed by his own immediate authorities, by Bodin as by Hobbes, who start with the analysis of sovereignty. Austin has perhaps somewhat increased his difficulties by taking law first; for his analysis of law leads him to exaggerate somewhat the nature of the element of *command*; then he has to use forced language to present every law whatever as a command of the sovereign, bringing the *penalty* into prominence, and lastly he has to accumulate the language of forcible compulsion and of unlimited power in his definition of *sovereignty*. Without saying that his language in analysing sovereignty is not to be justified, we must observe that he has used language about sovereign power in its capacity of unlimited might, which in effect is somewhat strained. Practically, we know, no sovereign authority is really free to make any law at its own will. And practically many sovereign authorities (such as a theocratic despot) are found strictly submitting to a conventional or customary law which they do not pretend that they are free to violate. Now, had Austin begun, like other writers on the theory of politics, by defining sovereignty, he might have avoided such violent phrases as this: 'Every supreme

government is legally despotic'; a phrase which I do not question as untrue, but which I think rather forced in effect. *Austin* He might simply have defined the sovereign as the power in every independent community which exercises political authority, which makes and enforces all orders of all kinds, and itself is subject to no orders having legal penalties behind them.

Why Austin should have found it necessary to fill so large a part of his first six lectures by enforcing, *usque ad nauseam*, the universal, unlimited, and illimitable despotism of what he calls the sovereign authority, is due, I think, to the following reason. Blackstone, and the school that he represents, were continually suggesting, in vague language, that there was a kind of universal law in the air anterior to legislation, and that the English common law in particular was an institution independent of legislative authority. Blackstone even went the length of saying that there was no binding obligation to obey any law that was contrary to the divine precepts. And these authorities were constantly assuming the existence of some binding law of a mysterious quality which no positive legislation could quite supersede. It was the force of this vague feeling which had animated the conservative resistance to the reforming projects of Bentham and others. These men vaguely regarded the old unwritten common law and the legislature as in some sense co-ordinate authorities, and they rather resented the encroachments of the more recent institution—as it seemed—the legislature.

There is much historical justification for this sentiment. Sir H. Maine has shown that *custom* is recognized as a binding force before *law* is recognized; and, therefore, long before distinct or explicit legislation is recognized. Austin found Bentham and his friends resisted by a body of theorists and politicians who regarded this customary law

as more ancient, more sacred, than any legislation, and in some sense superior to or independent of legislation. If, in Austin's own day, this idea was dying out, it must be remembered that Austin himself was a contemporary of Sir S. Romilly; that he lived in mental commerce with a generation earlier than his own. To him Blackstone and the defenders of the old constitutional and legal conservatism were living and ever-present realities—the obstacles to all progress and reform—Giants Despair and Doubting. Such I believe to be the explanation of the wearisome iteration with which Austin insists on the somewhat obvious position that the sovereign authority is the sole source of all that exercises powers of actual command in a state (i.e. material pressure to enforce its orders), and is itself free from any material or forcible impediment in changing these commands at will. For us this is now a familiar proposition; we have not the opponents that Austin and Bentham had, and we can go lightly over ground on which they laboured so stoutly.

Let us turn now to the proposition as to *Law*. Law, says Austin, is everything which this unlimited sovereign authority has recognized as having a binding force, and nothing is law unless it has been so recognized. No custom, or rule of convenience, no maxim of fairness, can make anything law in the absence of this sovereign recognition. The test of this recognition lies in this question—what sanction or penalty is incurred by those subjects who neglect to observe the rule? If there be no penalty, there is no legal obligation, no command and so no law. If there be a penalty for breach of observance, then the obligation is a legal, instead of a moral, one. And in the threefold analysis of *law* into the correlatives, *command*, *legal obligation*, *sanction*, we get attention most usefully directed to the elementary aspects of every rule of law: 1. In what

precise form has this rule been imposed as imperative? 2. On whom, and under what conditions, is the rule binding as a legal obligation? 3. What are the consequences in law to those who have neglected to observe that duty?

Those who know how difficult it is in practice always to detach in a labyrinth of concrete facts these three elements—as to the positive *authority* for a rule of law, as to the *compass* of the legal obligation it creates, as to the consequences of any *breach* of such obligation—they, I say, will be the first to recognize the value of these initial maxims graven upon the portals of scientific jurisprudence.

(iii.)

But these most pregnant definitions have been stated in too absolute a way. They belong to law, and cannot be carried beyond the world in which they spring. The analysis of sovereignty, of independent political societies, and of law contained in Austin's *Province of Jurisprudence* is of the highest value, provided that we recognize its relative character, and do not attribute to it complete philosophical truth. If we attempt to give this analysis an absolute value apart from law, or if we take these definitions to be strict and ultimate explanations *per se*, we are stretching the theory until it snaps. This corollary, or qualification of the theory, is due to Sir H. Maine.

Shortly stated, the theory of Austin as to sovereignty amounts to this. The force of all law is derived from that ultimate sovereign authority which in every independent political community actually exercises an unlimited power of command and is habitually obeyed by the bulk of the community. Now this proposition seems to me perfectly true, and in fact to be almost a truism, if we understand it in the sense in which it is said: i.e. as true for the *lawyer* from the point of view of formal and scientific law. And

for that very reason it is of such signal use in clearing the brain for the student who comes to law from the study of morals or other branches of social science. But from the point of view of a complete social philosophy, from the point of view of scientific history and scientific politics, the proposition requires so much qualification and correction, that it ceases to be a complete account of the matter at all. In a word, the proposition ought to run somewhat in this way: *The business of the lawyer is to consider the force of all law as derived from that ultimate sovereign authority which exercises in all regular and normal communities obedient to magistrates (what for purposes of law we assume to be) an unlimited power of command.* From the point of view of history, the theory has been subjected to a searching criticism in the close of Sir H. Maine's work on primitive institutions.¹ He gives us there a suggestion which seems equally ingenious and fertile: that the theory is true, just as the theories of political economy are true, when understood as resting on a hypothesis: on the assumption that one element of the entire problem is being abstracted for logical purposes from the rest and solved independently. And so, he says, the theory of Austin rests on the assumption that the only side of sovereign power which we are considering is its imperative side, and its means of compelling obedience; and the only side of legislation we are considering is its unlimited power of laying down the law, and the fact of its being uniformly obeyed. And for the lawyer that is exactly the assumption on which his whole train of reasoning rests. The one thing the lawyer has to do is to arrive at the true legal right and the proper legal remedy, and to attribute to the law as he finds it absolute power, if not absolute wisdom. With any right and wrong—apart

¹ *The Early History of Institutions*, chaps. xii, xiii.

from legal right and legal remedy—he has (for the purpose of his own work) nothing whatever to do; nor can he attribute any intention or desire to the sovereign legislature except that which it distinctly expresses and also enforces by penalties. For the lawyer, the sovereign author of law is an absolute autocrat, and an autocrat which is omnipotent if not omniscient. It compels every one; and its power of compulsion is without limit.

But it is very easy to see that from the point of view of the politician, the moralist, or the historian, or the philosopher, this assumption will not serve, and therefore that the theory itself is not applicable. Socially speaking, we know that if law rested simply on sovereign authority, if it were the whole of the truth, as the Romans sometimes said, *ius est quod iussum est*, society would dissolve; and the law would disappear with it. The lawyer shrinks from that other Roman definition that *ius est id quod iustum est*, precisely as the moralist shrinks from the *ius est quod iussum est*. But we all know that if law were really or permanently divorced from justice, it would not retain its binding power very long. Socially and politically viewed, the force of law depends on its coinciding with the moral judgement of the society, on its expressing public opinion, as Bentham says on its goodness, on its conforming to the 'general expectation'. Law would not be really imperative, we know, unless, behind the sword of the magistrate, the bulk of mankind felt the weight of social obligation, the irresistible burden of custom, of immemorial tradition and the like, a social and even a religious sanctity. But then the lawyer has to put aside all these forces, for there are occasions on which these forces are doubtful or conflict with the letter of the positive law, and they always tend to warp positive law. On such occasions the lawyer has to follow his text in the

statutes or the reports. And thus it comes about that the lawyer has to assume law as resting on the single force of sovereign authority; whilst in other branches of thought we could only assume this hypothesis with the certainty of ending in confusion and positive error. Politically and socially speaking, law rests on something more than force. Juristically speaking, it rests on force, and force alone.

Sir H. Maine has shown us, in the chapters quoted, with what strange results we are confronted when we compare this theory of sovereignty with historical facts. The origin of sovereign powers has been almost infinitely varied, and sovereignty is found under the most widely different states of social cohesion. Sovereignty may indeed be brought in all under one general definition in words, but the actual conditions under which that sovereignty is exercised and the actual manifestations of its powers are so strangely disparate in ancient and modern societies, under an Eastern theocracy, or an Athenian Demos, or a British constitution, that the definition itself thus extended becomes purely verbal and hardly explains anything. As Sir H. Maine shows, the theory excludes from view the mass of historical traditions, which in almost every society known to us really gives sovereignty its social efficacy and its distinctive character.

On the other hand, all this is just what the lawyer has to exclude from his view by a scientific artifice. He is bound to assume that the moral, historical, and social forces which make up so large a part of sovereignty to the philosopher are of no account; because moral, historical, and social authority cannot make forensic law; and sometimes it conflicts with law as laid down by judges; or darkens law, as law is understood by a modern lawyer.

And furthermore, the proposition, or assumption, that there is always discoverable in every political society

a determinate sovereign, can only be fitted on to some extreme forms of societies at the opposite pole to that of our Western civilization, by the use of explanations and ingenuities which reduce the statement to a merely verbal meaning. Here, again, we have a further proof that the theory is relative to the purpose of the modern lawyer, and is only adapted to societies in a condition similar to our own. In other words, it must be read with this postulate, the lawyer of civilized states has to assume, that the force of all law is derived from the determinate and formally constituted sovereign authority of the state.

Nor is the assumption that this determinate sovereign power is unlimited at all more true outside the strict province of law. It is obvious that society implies a mass of conditions, limits, and obligations lying upon the sovereign authority. The theory may be stretched until it bursts when we suggest, as Sir H. Maine points out the Austinian analysis of sovereignty implies, that the Sovereign in Parliament might pass a statute for the slaughter of weakly children. No sovereign, as a fact, has unlimited power; no sovereign, not even a despot with a disturbed brain, or the Greek tyrant who is typically spoken of as a sort of wild beast, but is bound by a multitude of limitations, which in fact are stronger than any formal law. The most absolute despot of whom we have any knowledge, such as a Sultan in a purely Mahometan country, blindly obeyed in all things spiritual and temporal, the absolute master in theory of the bodies, and souls, and property, the beliefs, the acts, the ritual, and the labour of his subjects, is usually himself the slave of a code of traditional observance. This unwritten code is the object of more mysterious veneration than any modern body of law; it is not definitely enforced by any courts of justice; it is armed with no definable sanction; it reminds us of that un-

nameable sanction of the law parliamentary, as Mr. Speaker said, 'God in heaven only knows what would happen' if the obligations of it were violated: and there is often no man or body of persons who have any power to change it, or in whose will it resides. Indeed, it is easy to imagine cases, and they abound in ancient and in Eastern history, in which the actual *de facto* sovereign, i.e. the sole and ultimate depository of all physical power, is regarded as the enemy of law; and his irresistible commands are contrasted with some unembodied undefined mass of usages or observances which are supposed to be the law, but of which no one pretends to be the authorized exponent, and which no one pretends to be able to change or to enforce.

These considerations show that Austin's conception of sovereignty deliberately excludes every other aspect of sovereignty except that of its legislative power; and that the conception has no place, and even no meaning, if taken to be a truth in social philosophy. It is intended to draw attention to this—that the limitations on sovereign power are not *legal* limitations, that what obligations the sovereign power is under are not *legal* obligations, are enforced by sanctions of different kinds, but not the sanctions of the law courts. The consideration of the limits on the sovereign power carries us outside of law courts, and therefore outside of law. If the sovereign be really sovereign, it will be able to compel its own law courts to enforce its own laws. Therefore, *to the lawyer, and for purposes of law*, the sovereign is unlimited. Any limitations of this sovereignty lie wholly outside the lawyer's province.

Austin's definition of sovereignty itself perhaps allows for that element of possible limitation on sovereign power by conditions external to law, in the clause in which he speaks of it as being habitually obeyed by the bulk of the community. We know as a fact that every conceivable

type of sovereignty would only be obeyed by the bulk of the community within certain limits. No despot of ancient or modern times would be at all obeyed in some conceivable commands. Not only the bulk of the community, but the entire community would utterly defy him and refuse obedience, if he gave certain orders. Czar, Sultan, an emperor like Caligula, the old king of the Assassins, or the late King of Dahomey, all have limits perfectly known to all men, within which alone they can issue commands that will be obeyed. In theory Parliament, or King, Lords, and Commons, are omnipotent in England; but we all know that the bulk of the community would only obey an Act of Parliament within certain limits. A law of outrageous injustice and cruelty would be universally defied, even if regularly passed. Consequently there is a certain ambiguity in saying that the sovereign is 'that authority which is habitually obeyed by the bulk of the community', and then that this sovereign is 'unlimited', because there are very strict limits to the habitual obedience everywhere. If we took this proposition as holding good in political philosophy, it would be a sophism. But for law it is strictly true. No theory of scientific law can hold good for social convulsions, states of anarchy, rudimentary theocracies, or barbarous tribes. And the reason is this. Any scientific law implies the regular action of established law courts; and in states like those supposed there are not regular law courts. When the theory breaks down, then we have passed into a social sphere where '*law*', as we mean law in law courts, has ended; or has not begun.

There is, too, another qualification with which the theory has to be guarded. Cases may be imagined of societies very widely different from our own, in which the theory can only be applied, if it is applied at all, by a violent straining of language, or by a series of artificial postulates.

There can be supposed societies in which the political forces are too ambiguous to admit of precisely determining the sovereignty, or to which some historical accident has given a form hardly political; as where the legislative force is practically absorbed in the force of custom or undefined habit, with no recognized sanction and no official interpreter. And some societies are so very rudimentary, or so very unstable, or so very minute, that the theory becomes ridiculous if strained to apply to them. Now this would be a fatal objection to any law in social philosophy pretending to explain the conditions under which men live in society. But it is no objection at all to a theory which professes only to explain the phenomena of law as law is understood in the law courts of civilized states. Law is, after all, a perfectly artificial set of rules, suited to the practical conveniences of civilized men, and the product of infinite accidents, compromises, and adaptations. It is irrational to look for generalizations in this sphere, such as belong to the eternal relations of human nature under all terrestrial conditions.

The generalizations of law are, therefore, only meant to apply to such highly civilized communities as have, except in moments of anarchy: (1) a perfectly defined centre of sovereign power; (2) where the spheres of positive law and of moral obligation are habitually treated as separate; (3) in which the resources of the tribunals and the range of their power are perfectly marked and generally recognized. It is very easy to imagine political societies in which these elements are held, as it were, in solution, in which the standard of right and wrong and the decrees of the tribunals seem mutually interchangeable, or where they inextricably overlap; where the moral and political forces are in unstable equilibrium, so that one of the two sometimes seems to disappear or to be transformed into the other; where the

practical sovereignty seems to be personal caprice ; or where the only sovereign seems to be habit without force at all, and even without will at all. We can imagine such political societies ; and to the historian and to the social philosopher they are exceedingly fruitful fields of study. But the lawyer finds that they do not present examples of *law* as understood in civilized states. They lie as completely outside the sphere of his work as societies of beavers or republics of rooks.

The result is that the Austin analysis of sovereignty is a perfectly sound conception when read in the light of the assumptions by which it is qualified, and limited to the sphere to which it belongs. It belongs strictly to law ; and the assumptions or hypotheses on which it depends are : (1) that the lawyer is considering sovereignty only on the side of force ; (2) that for his purpose he assumes the force it exerts to be unlimited ; (3) and that he is considering force only as it is applied by the tribunals of settled modern societies. With these assumptions the proposition as to sovereignty is strictly unassailable. But as a general proposition of human society, without the prefixed qualifications, in a word, treated as a philosophical principle, it is quite assailable and not very intelligible. A real step has been taken in the history of scientific jurisprudence when Sir H. Maine pointed out the conditions under which the definition of Austin must be read—conditions, I think, rather ignored by Austin himself. We now know that the historical and political difficulties in the path of Austin's doctrines are difficulties to it only when regarded as an absolute truth, and do not diminish its relative value to the student of modern law, in strictly marking out to him the limits of the field before him.

CHAPTER II

AUSTIN'S ANALYSIS OF LAW

WE have spoken of Austin's Definition of Sovereignty. We will pass to the second of his leading propositions, the definition and analysis of law. In this he is the editor and expositor of Bentham, who himself follows Hobbes. Gathering up their statements, the combined results amount to this: Law is a general *command*, which the determinate Sovereign, or supreme political authority of a State, has imposed as an *obligation* on all, or a part of, its subjects, and which command it enforces by a *sanction*.

Austin insists that law involves always these three elements, which in law are correlative and mutually imply each other: (1) command, (2) obligation, (3) sanction. And the whole depends on the sovereign authority of an independent political community, such sovereign being possessed of unlimited power.

This analysis of law is open to observations similar to those already made as to the proposition about sovereignty. That is to say, it must be understood from the point of view of the lawyer, and as being only one of the aspects of the question. If we regard it as a truth of social philosophy, or if we look at it as true absolutely without qualification, we shall get into confusion. And if we take it to be a strict or complete definition of *law*, we shall find it inadequate. The proposition is most useful in drawing attention to this: (1) That law is always a matter of necessity—it is never *ought*, but always *must*; in that sense it is always and everywhere *imperative*. (2) The important side of law

is not so much *right* as *duty*, i. e. the one invariable element of all law is the compass and incidence of the *obligation* which it imposes—*whom* does it bind, and *what* does it bind him or them to do? (3) The third element, everywhere present in *law*, is, What is the *legal* consequence of neglecting or breaking the obligation? What is the *sanction* or penalty on disobedience to the command?

Now these three elements are always present in every law; and they are of primary importance to the lawyer. But, then, this is only one way of looking at law. It purposely drops out of view other very important sides of law. And, it is obvious, there are some cases in which it is so exceedingly one-sided, and requires so much qualification and explanation, that it would be actively misleading if taken by itself.

In fact, neither Austin's account of law, nor that of sovereignty, is to be taken as a *definition* strictly; much less as true in any absolute way. And his account of *law* is perhaps open to larger qualification and needs even more explanation than his account of sovereignty.

In the first place, the word *law*, it has been repeatedly pointed out, always involves the two notions of (1) *command*, (2) *order* (in the sense of regularity). So, too, the modern word *order* implies sometimes *command*; sometimes *regularity* or *arrangement*. In all languages, and for almost all branches of thought, *order* suggests the two ideas of force and uniformity. And *law* does the same. In the lectures already cited Sir H. Maine points out how completely ingrained into our modern fibre of thought is the notion that *law* implies uniformity.

Now when Austin insists that law is a command, and that all law is imperative, he is forcing attention on this one side of law, viz. force; and he rather puts away that side of law by which it implies regularity. Montesquieu and others

whom Austin assails with such fury were engaged, for a very different purpose, in drawing attention to the uniformity implied in the word *law*. And so much confusion has been cast upon the law of the jurists by those who talked vaguely of the *law of nature* and the spirit of equity, that Austin was naturally driven back with energy on the position that nothing is law (i. e. law of the jurist) unless it have force—unless it be a command with a sanction of punishment.

But then, although nothing is law unless it have the force of a command, it does not at all follow that the other side, *regularity*, can be left out of view in law. On the one hand, no regularity can be called by the jurist a *law*, unless it be commanded by a political sovereign; on the other hand, no command whatever is a *law*, unless it have the element of regularity or generality. This Austin recognizes when he says that every law must be a *general*, not a particular command, even if it be addressed to one person and not several. In the same way Bodin, the original author of this analysis of sovereignty and law, says that law is 'a command of the Sovereign to all the subjects in general or concerning general things'. The idea of general rule is, an indispensable feature of law. Thus, Austin's account of law, that it is a species of *command*, tends to put out of sight the co-ordinate idea of *general rule*; and may be easily misunderstood as making the idea of general rule subordinate rather than co-ordinate, if we were to take it as amounting to a strict *definition*.

Now there are a great many aspects of law in which this element of *general rule* (always present in law) comes to the front in a preponderating way, and in which the element of command recedes from prominence until it might almost be said to be latent. And in these cases to say baldly that '*Law is a species of command*', as Bentham and Austin say, involves so much qualification and assumption that language

yet
decis
a spec
can
the

is violently strained, and the description retains little more than verbal accuracy. Not only does the element of *command*, but with it that of *obligation* and of *sanction*, become sometimes so little active that a superficial view would imagine them absent altogether. They can only be traced by a good deal of indirect inquiry, and by discovering them at last as the ultimate consequence of one or two antecedent suppositions. There is always an evil in presenting as a definition for any general term some element in it which at times can only be detected by a somewhat subtle series of hypotheses, or which is sometimes present in an indirect way. There are cases in which almost the only element directly apparent in law is that of a *general rule* which the courts of law recognize. Recognition by courts of law involves ultimately all the elements on which Austin insists; but it is in some of these cases a very indirect process which exhibits either *command*, *obligation*, or *sanction*, in any but a potential state of existence.

Take the case of the enormous number of enabling statutes, of laws conferring franchises, of laws affecting status, of laws merely laying down general rules for the interpretation of instruments or for the guidance of courts of justice and the like. In all of these the idea of *command* and *sanction* can only be traced by an indirect method. For instance, by 26 and 27 Vict. c. 120 it is enacted, that benefices of which the Lord Chancellor has the presentation may be sold in a certain way. Now this is undoubtedly a law. But the *prima facie* and direct aspect of this law is a *general rule* which the courts of justice recognize. Directly viewed, it is hard to say what command is given. No one is forced to do anything except in the indirect way; and, if some official does something in his discretion, he shall do it under specific conditions. No person is put under any legal obligation directly. It is entirely a matter of discretion whether any

benefice be sold or not—there is no legal obligation on any person to sell. There is no sanction imposed on any person directly. No one is under penalty if he neglect to sell any benefice. The entire enactment is permissive and enabling throughout. Nothing new certainly is commanded. Something new is permitted at the discretion of certain officials. And if they think fit to do it, they may do it in a given way. No command is imposed, no sanction specified for doing it in any other way. The law remains just as it was except for the case specified. It may be said, that the act repeals a tacit law not to sell the Crown property, and relieves certain officials from the sanction which they would otherwise incur by an unauthorized sale of Crown property. ✓ Austin argues that permissive laws restore some persons to rights, and impose corresponding duties to protect those rights; and thus all permissive laws are really (though indirectly) *imperative*. But how could it be argued that this statute enabling officials in their discretion to sell Crown property, otherwise unsaleable, restored them to any *rights* of which the law had previously deprived them; and commanded all other persons to respect this revised right of theirs by corresponding obligations? All this is highly circuitous, and a violent straining of language.

No doubt there is an element of *command*, of *obligation*, of *sanction*, in this statute under certain possible circumstances. If the permission to sell is acted on, the sale *must* be in a specified way, all officials concerned and the public generally are under the obligation to conform to the specified mode if there be a sale; and the Courts of Justice will so far enforce this obligation by a *sanction*, in that they will order anything done otherwise than in conformity with this obligation to be treated as undone. But all this is very circuitous. *Prima facie* the statute is a general rule enabling something to be done, if certain persons think fit to do it; imposing no

new obligation at all, and certainly reviving no anterior right. Austin declares that there are no laws simply creating rights; so we cannot say that this statute conferred the new right to sell Crown property. Although we can easily discover in this enactment a potential command, an unexpressed obligation, and a dormant sanction, it is not the direct character of this law. *Prima facie* it is a general rule to be recognized by Courts of Law.

Now an immense body of modern laws are permissive and enabling or directing laws of this kind. Take such a statute as that for the formation of new parishes under 6 and 7 Vict. c. 37, and subsequent Acts. This is undoubtedly a *law*. Certain things may be done, and certain ways are pointed out in which they may be done. But where is the Command? Where is the Obligation? Where is the Sanction? No doubt a little ingenuity can detect these elements. *Prima facie* no one is ordered to do anything. No one is bound to do anything. No penalty is imposed either for doing or for not doing. 'All laws impose acts or forbearances,' says Austin. What act or forbearance is imposed by the State enabling the formation of new parishes at the discretion of the Ecclesiastical Commissioners and the Bishop? All that we can say is that if the Commissioners and the Bishop do exercise their discretion, and in so doing follow the terms of the statute, then the parishioners concerned and the public have imposed on them the duty of acting on the footing of such decision and of forbearing from interfering with it. But all this is exceedingly roundabout.

Take the law relating to qualifications for various public duties—say that of juror. Every man of a certain age, having a property of a certain value and kind, is qualified to serve on a jury. This is a law. Where is the Command? Where the Obligation? Where the Sanction? No doubt a man so qualified is bound to serve (exemptions apart), but

only *if* the sheriff shall summon him. The sheriff may be said to be commanded to summon men so qualified, and none but such men. If it were shown that a jury had sat which improperly contained men not so qualified, a remedy would be found, though none is specified; and so far a sanction would be imposed. But all this is highly indirect. *Prima facie* the law is a general rule to which courts of justice will give effect.

Let us suppose the Female Suffrage Bill to become law. In that case there would be a new law, the whole of which would be, that in Parliamentary Electoral Acts the word 'person' shall imply female as well as male person. Now here is a law of a very important kind. Where is the Command? It may be said, that every official concerned is commanded to include qualified women in every case in which he would include qualified men, and the public are commanded to forbear from any Act which proceeds on the footing that women have not parliamentary franchises. But this is very indirect. When we speak of laws relating to certain persons or classes, and imposing obligations, we usually think of the obligation as imposed on the persons concerned, not as imposed on the officials who administer the law. Thus a law imposing the penalty of death for murder is usually taken to be a command, imposing on all subjects the obligation of abstaining from murder; the sanction for the breach of this obligation being hanging. It would be an odd inversion of terms to regard this law as being a command imposing on sheriff and judge the obligation of arresting and sentencing the murderer, the sanction of this obligation being the penalty for breach of official duty. And yet in the Female Suffrage Bill and the like it is difficult to see what command is imposed or what sanction or evil is threatened to the class, or rather sex, to which the Bill directly relates, or on whom any Command or Sanction

is imposed, except on the unnamed officials whose business it is to see the law administered.

Again, take the case of laws relating to judicial construction and procedure. Let us examine, say, *the Rule in Shelley's case*. Here is a law of great importance.¹ Where is the command? What duty does it impose, and on whom? What is the penalty for breach of its order? No doubt the judges are required by it to construe a deed or will in a particular way. In one sense we may say that the public is bound to construe all documents in obedience to it—though this is somewhat forced. But, if they neglect to do this, what is the evil they have to fear? We may say a lawsuit, and the prospect of having to undo all that they have done, or to refund all they have received, in contravention to the *Rule in Shelley's case*. But all this is remote and purely inferential. The *Rule in Shelley's case* does not say anything of the kind, and does not give any one the remotest clue to discover what penalty would be incurred by violating it or acting in ignorance of it.

Now the *Rule in Shelley's case* is not a single example. The immense body of the law relating to wills and the construction of written documents stands upon the same basis. The same observation might be extended to a very large proportion of the work of courts of equity, and to the bulk of the rules relating to the conveyance of property, to trusts, infancy, and account. Take such ordinary textbooks as Jarman on Wills, Lewin on Trusts, Sugden's Vendors and Purchasers, Morgan's Practice, or the like, we

¹ The rule is as follows: Where an estate is limited in such a way as to confer a particular estate, and this limitation is followed either mediately or immediately by a subsequent limitation to the heirs, or the heirs of the body of the holder of the particular estate; then the words *heirs*, or *heirs of the body*, shall be words of limitation and not of purchase.

shall find an immense body of laws (at least rules of law) which it would be very difficult to say were primarily commands, imposing a legal duty under threat of a penalty. Take the case of a statute of naturalization or legitimation. A law simply declares that the sons or descendants of *AB* shall be held to be legitimate, or that *A*, *B*, and *C* shall be held to be natural-born subjects of the Crown. Or a law may confer franchises or capacities; as that aliens can hold real estate, or that Jews may vote or hold offices. Austin insists that there are no laws simply conferring rights. But the obligations imposed by these laws are rather *indirect*, and the sanctions or evils threatened on breach of the obligation are still more indirect. All that we can say is that all persons are commanded to act upon the footing that the persons described in the Act are legitimate, or are natural-born British subjects; and if they fail so to act, the courts of justice will by appropriate orders rectify all proceedings taken in contravention of this rule, and oblige all persons to conform to it. But all this is exceedingly forced and circuitous.

There are very serious objections to any definition or description of general ideas which require long and guarded explanations to make them apply. Definitions ought to have the salient feature always in marked prominence. In all criminal laws it is very easy to see at once the command, the obligation, and the sanction. If burglary, or breaking a dwelling-house by night, is made punishable by penal servitude, it is plain that all subjects are commanded to abstain from so breaking dwelling-houses, under pain, if they violate this negative duty, of undergoing the penalty of penal servitude. It is significant that Austin's examples almost invariably turn on criminal law. But when we quit the ground of criminal law we find an immense proportion of the rules of law in which the

command and the sanction are far from being obvious. And I suppose that these rules of law are to the rest in the proportion of about ten to one.

I am far from saying that Austin's analysis of *law* cannot be applied to all these cases, or that it actually breaks down. He himself allows that there are laws which are not on the surface *commands*, inasmuch as they are *permissive*, or *abrogate* other laws, or are purely declaratory. But it is difficult to bring the rules of inheritance, and the thousands of rules of similar kinds, or the rules as to the qualifications of jurors or voters, under any of these three classes. There *is* a sense in which Austin's account of law applies to all the cases named. Every rule of law, of whatever kind, lays down a hard and fast line; it is not advice; it is not an ideal or a custom, or an example of any kind. It provides that something is to be observed as a fixed rule, and the courts have power to make it observed by force, and in that sense it is imperative. The *Rule in Shelley's case* is of binding authority immutably against every subject within the jurisdiction, and for every settlement interpreted by the English rules of real property. In that sense it is a command. And although no penalty is imposed on those who doubt the *Rule in Shelley's case*, or on those who choose to disregard it, the courts always have a remedy for non-recognition of it, and can compel all who may disregard it in act to submit to it with all its consequences.

But as all this is a somewhat oblique way of looking at it, and as an immense body of rules of law stand on the same footing, it would seem better in any definition of law always to keep in sight both aspects of the notion of *law*, i.e. the *command* and the *uniformity*, and not to rely specially on the notion of command, which is frequently kept in reserve. So again, there are many masses

of law in which the obligations they create only appear indirectly and by inference; their direct and obvious operation is to confer capacities. Lastly, there are the vast majority of the rules of law, the important aspect of which is not the implied or remote sanctions by which they are guarded, so much as the various results and ulterior rights and obligations which flow from them.

Now it is possible to frame a description of law which shall combine the two aspects of *command* and *rule*; and which, without losing sight of the *obligation* and the *sanction*, should admit notice of those capacities and their consequences, the only direct product of so many rules of law. It might run thus: *Law is a general rule respecting the property, person, reputation, or capacity of the citizens of a state, which the sovereign power therein will cause to be observed by the authority it delegates to its tribunals (or, will enforce in its tribunals).*

It will be seen that this definition adds the subject of law to mark it off from administrative orders equally issued and enforced by the political sovereign. It adds the term *tribunals* to distinguish the sanctions imposed by courts of justice from those of discipline. And it resolves a *general command* into a *general rule which is caused to be observed*; so as to keep *pari passu* the double notion in law of *regularity* and of *force*.

It seems a serious defect in Austin's account of law, that it fails to distinguish laws from purely executive rules, standing orders and the like; and that it fails to distinguish the sanction of executive and administrative discipline from the sanctions of the law courts. It is singular to find him speaking, by a rather liberal use of language, of orders issued by public departments as being really laws, although not so called.

Here especially precision of language and thought are

needed. It is peculiarly unfortunate that Austin has treated these questions somewhat meagrely, and that he makes light of the great distinction drawn by almost all publicists between laws of the law courts and administrative regulations. No doubt Blackstone had emphasized the distinction between the executive and legislative powers: and this was often enough to make Austin deny a proposition by repulsion. Perhaps Blackstone has used too popular language in defining the respective seats of these two powers. Yet I cannot but think it a misfortune that Austin stopped where he did in correcting Blackstone; and, having shown that both are derived from the same sovereign, did not go on to point out the immense importance for the lawyer of the difference between the rules enforced by courts of justice, which are *laws*, and rules enforced by executive powers, which are *regulations*. Unluckily by not following up this distinction, Austin's definition of law covers these regulations with which the lawyer has nothing to do. And thus his definition of law does not strictly relate to the law of the lawyer.

It is easy to see how Austin came to this result. His mind was so much fixed on the political sovereignty, on the sanction by political force, and on the command given by delegated authority that he disregarded the important subdistinction of the nature of the sanction and the kind of command. It is no doubt true that the authority of the legislative, judicial, and executive forces can be all directly traced up to the same source. The political sovereign alike imposes all three by more or less direct machinery. And Austin is quite justified in saying that from the point of view of political sovereignty, the distinction is not to be carried far. But from the point of view of the lawyer, it is a crucial distinction. Austin's analysis of law is sufficient for the purposes of political

philosophy, for the purposes of Bodin, or Hobbes, and even of Bentham, as a law reformer; but it is not sufficient for the purposes of strict jurisprudence. It might have suggested to Austin that, as a scientific lawyer, he had stopped too soon in his analysis. His definition was left in too high and too general a region, for it includes a mass of matter which courts of law decline to recognize.

Austin defines law as a command directly or indirectly imposed by the supreme authority on political inferiors, commanding an act or a forbearance. Thus a rule that judges of the superior courts will only hear parties in person or by counsel called to the bar is (Austin would say) a rule of law. Undoubtedly a court of appeal would make it observed, and might conceivably decide a case in conformity to it. They would enforce this rule of law. But take a rule made by the Commander-in-Chief with the delegated authority of the Minister of War, and ultimately the delegated authority of the political sovereign, to the effect *that only men standing five feet five inches will be enlisted in infantry regiments*. This is not a law—it is a rule of the service. Courts of law will not observe it, or cause it to be observed. If it be violated, courts of law decline to give any remedy. No one could complain to the courts of law that he had been excluded from the army by it, or that he was not subject to the rule. Yet such a standing order of the Horse Guards seems within Austin's definition of the law: it is a command of a general kind indirectly imposed by the delegated authority of the sovereign on political inferiors. Anything done in contravention to this general order would no doubt be remedied by the proper political superior; and its observance would be enforced by that superior by means of the proper sanctions. But these would not be the sanctions of the courts of law. They would be administrative, not legal, sanc-

tions: dismissal from the service, loss of pension, and the like—not fine or imprisonment. We know the efforts which have been made to bring acts of administrative discipline within the view of courts of law. But courts decline to interfere with administrative acts. All that they do is to see that persons are not exposed to injury in person, property, capacity, or reputation by a fraudulent or malicious perversion of administrative discretion.

The cases are separated by a distinct but often narrow partition. Every one of a certain age, and possessing certain property, is qualified to serve on a jury. This is a law. Law courts see that this is enforced by legal sanction. Every one of a certain age and height and physical development is qualified to serve in a line regiment. This is not a law. Law courts do not recognize this rule. The War Office and the Horse Guards do. Yet both rules are set by the political sovereign to political inferiors, both apply to subjects generally, and both are enforced by the political force of the State and effective sanctions. Austin's definition of law therefore covers both. The rules as to the qualifications of electors for Parliament are undoubtedly laws. They have frequently been revised in the various Reform Acts. The rule that the House of Commons must originate a money bill is not a law in the eyes of law courts; nor are the standing orders of the House of Commons. If a conscription were enacted for England, the liability to serve would be defined by a law; the exemptions as to age and the like would be laws, or parts of a law; yet the exemptions as to physical development, duly made by the War Office, would not be laws, because law courts would take no notice of them, although in every other particular they would resemble the rest of the rules made by the indirect authority delegated by the legislature to political ministers.

These are not isolated exceptions. There is a vast body of rules of an administrative kind which it is most essential for the lawyer to distinguish from laws. These rules are not simply in the great departments of State; there are numerous collections of regulations under municipal authority, others of certain corporations recognized as having public character. If these rules are by-laws made under a statutory authority, they are laws, and as such are recognized by courts. Otherwise they are merely disciplinary regulations. None of them are laws in the sense that the *sanction* of them is applied by law courts. The sanction in all such cases is often very sharp and effective, but it is disciplinary, not judicial. Courts of law decline to review, or give effect to, or modify these sanctions. It is of primary importance for the lawyer to be alive to these distinctions between *disciplinary* and *judicial* sanctions, and to remember that many public regulations, enforced by political superiors, are not *laws*. There may be *command*, *obligation*, *sanction*, and yet no *law*, as law is understood by lawyers.

There is not a little inconvenience in introducing into the definition the term law courts, or tribunals. There is something of *ignotum per ignotius* in it. But, I believe, there is no help for it. It will be found impossible to frame any definition of *law* without using, as a test or limit, the powers exercised by courts of law. There is no general principle which will serve to show uniformly what rules have a judicial sanction and are enforced by courts of law, and what are only enforced by executive sanctions or by public officers who are not judges. The distinction is of the utmost importance to the lawyer, but it can only be tested by the question, Will the courts of justice cause the rule to be observed, and will they find a remedy for breach of it? The cases often run exceedingly close, and

it is difficult sometimes to give an answer to this question. We are familiar with the highly interesting cases in which the municipal and constitutional law touch, or the Parliamentary touches, on the judicial sanction: as the cases where it is a matter of nice determination whether the courts of law or one or both Houses of Parliament form the tribunal; the cases whether the discretion of a public official has been *bona fide* exercised, or whether the mode of carrying out a rule can be reviewed by courts of law; such cases as those which occasionally arise as to the sanction to the rules made by inns of court or universities, or ecclesiastical corporations, and the like. The extremely nice distinctions which these cases raise, show us, I think, that we cannot rely on principle to define strictly a *law*, in the juristic sense or the forensic sense, unless we recur to the test, Will the courts of justice provide for its being observed?

There are some other provisoes with which I think it necessary to guard Austin's analyses of primary legal notions, and some precautions taken lest we attribute to them an absolute value. His famous analysis of right and duty, of absolute and relative duties, and his lectures on the division of rights into *ius in rem* and *ius in personam*, are exceedingly useful examples of an abstract treatment of concrete notions. But I think these analyses are open to the following observations. In the first place, they are decidedly too abstract, remain too high up in the region of metaphysics, to be practically used as modes of grouping by the lawyer. The lawyer wants divisions of law much more close to his concrete rules. In the second place, these divisions do not enable us strictly to group all law. They are not exhaustive scientific divisions; or they can only be strained to cover every form of legal rule by an effort of ingenuity and a forcing of language which

seriously destroy their practical usefulness. In the third place, great as is the value of these analyses, they are valuable, I think, for logical, rather than for technical purposes. And it seems to me that great confusion would arise from any attempt to distribute any body of law in accordance with the principle. Austin, at times, uses language as if he would actually draw up a code of English law divided into the sections, and following the order, which this analysis suggests. I cannot but think that this would be perfectly confusing in practice, even if it did not revolutionize the broad modes of arrangement which lawyers have followed since the days of Gaius. But in addition to this, the analysis cannot be strictly applied with scientific precision to the whole body of any *corpus iuris*.

The following examples will show the difficulties which such an attempt presents. Every law, says Austin, is a *command* of a sovereign body, whereby it imposes an *obligation* to do or to forbear, and which it enforces by a *sanction*. Command, duty, sanction, are correlative and imply each other. Every law imposes a duty; but every duty does not confer a right. A duty may correspond with no right; it is then an absolute duty. An absolute duty is always enforced criminally. If it correspond with a right, it is a relative duty, and belongs to the civil law. In the civil law, therefore, duty and right are correlative terms. That is to say, in the *civil* law (as opposed to *criminal*) every law creates a right as well as a duty. A right is vested in a person when another, or others, are bound or obliged by the law to do or to forbear, *towards* or *in regard of him*. A right is either *ius in rem* or *ius in personam*. If the former, every one is bound generally; if the latter, a determinate person or class are bound, *towards* or *in regard of him*.

Such is Austin's classification of laws. Now examination will show a mass of rules in the civil law which can only be strained on this Procrustean bed by a rather severe use of legal torture.

Every law, says Austin, creates an obligation; every obligation is either absolute or relative. Every absolute obligation is enforced by criminal law. Every rule of *civil* law creates a relative obligation, i.e. one with a corresponding *right*. And every right is *in rem*, or *in personam*; i.e. avails generally, or against a determinate person or class. Now let us take one of the most important of laws—*every will must be in writing*. This is clearly a rule of the *civil* law. The obligation lies on the intending testator to write, not to enunciate, his will. It is (since it is in civil law) a relative obligation; it has a right corresponding to it. What is that right? In whom does it reside? Is it a right *in rem* or *in personam*? Of course no one entitled under the will can have any *legal* right, or bring an action to compel a testator to make his will in writing; nor can any one interfere with any one who may choose to make his will in any form, or not to make it at all. All that we can say is that the person who may ultimately be entitled at law to any property which an intending testator may leave at his death, if he were intestate, will have a right not to be deprived of it by a document short of a legal will duly executed in writing. But *nemo est heres viventis*; and if a fanciful testator chose to execute his will in an allegorical picture, it might be fifty years before any determinable person or persons could be said to have a right to dispute the picture. It is a very circuitous way of looking at things to say that the rule—*every will must be in writing*—creates a specific *ius in rem* or *ius in personam* in any determinate person of a definite description.

Again, we may take the *Rule in Shelley's case* already

mentioned (p. 44), or any rule as to the interpretation of documents. The rule is clearly a rule of *civil* law. What is the *right* which it confers? In whom does the right reside, and of what class is it? As we have seen above (p. 46), it is rather a straining of language to say, that by this rule of law the sovereign commands any one to do or to forbear, and imposes an obligation by means of a sanction. But assuming that we can say that the rule commands all persons to forbear from disturbing the enjoyment of any person who would be entitled to an estate in fee, or an estate in tail, under a settlement if it be read by the light of the *Rule in Shelley's case*, it is of course a relative obligation, and has a corresponding right. What is the corresponding right, and in whom does it reside? It might be said that the rule creates a right in favour of such persons as by means of the rule obtain an estate in fee or in tail. But this is a forced use of language. Primarily, the object of this rule of law is not to create rights, but to establish uniformity in the interpretation of documents.

It is a rule of law that *a legacy given to the witness of a will is void*. How are we to throw this into the language of *right* and *obligation*? We may say that every testator lies under the obligation (is commanded by the sovereign) to abstain from making an intended legatee a witness, or a witness a legatee, under the sanction of disappointing the object of his bounty, and having his legacy set aside by courts of law. But where is the corresponding right? The intended legatee can have no legal right. All we can say is, that those entitled to the testator's estate in default of the legacy taking effect, have a right to retain any legacy given by a document of which the legatee is himself a witness. But all this is a violent and unnatural straining of a plain rule. The rule is not designed primarily

to give any one any rights, but simply to protect the public against wills and bequests made under undue influence.

Similarly, we might go through a mass of rules of law relating to wills, and it would be difficult in many cases to say what right they directly created, and still more difficult to say if this were a right *in rem* or *in personam*. Doubtless at the end of a long chain of possible cases some one might ultimately be found to have a *right*, which but for this rule he would not have had. But is this saying more than that, under every rule of law which courts of law will enforce, some one may receive a benefit, which benefit or right he may be in a position to enforce? There is some awkwardness in asserting in an absolute way that every law *necessarily* creates a specific right, where the right or benefit ultimately arising is often so remote as well as so exceedingly indirect. For example, the body of the rules of evidence has been codified or suggested in Sir J. F. Stephen's well-known book. We may take any simple rule as to the attestation of a document. What right does such a rule confer, and on whom? Doubtless every law requiring proof of a document in a certain way creates a right in every person whose interest it may be that the document should not be proved at all. But this is exceedingly indirect. How determine the person on whom the law confers this right? There are thousands of cases, say in the friendly administration of property, in which the rules as to the attestation of a document simply cause inconvenience to every one concerned. It may be against every one's interest that this obligation should be enforced; unless we say that the public, or the sovereign, have an interest and the right to enforce the rule. But, in Austin's language, the sovereign has no rights.

There is a common maxim in equity, Whatever is duly

directed to be done is regarded as having been done. Let us assume that applied to a case of administrative judicial business. It may be difficult to trace any specific right directly created thereby. It will in result ultimately affect rights. But it is not the object of the rule to create any specific right in any determinate person of a specified class, either *in rem* or *in personam*. There are similar rules as to the registration of deeds and the like. A deed affecting real estate in Middlesex must be registered. A deed of gift is made without consideration, and it remains unregistered. What kind of right is created by this rule, and in whom does it reside? A gift of realty to a charity not duly enrolled is void. What right is created by this law, and in whom is it vested? The intending donor may be said to lie under the *obligation* of duly registering or enrolling his deed of gift, under the *sanction* of having his gift set aside. Here the only person, other than the public or sovereign, who has any interest in enforcing this obligation is the party receiving. Yet he has no right. For if the giver neglected or refused to register or enrol his deed of gift the object of his bounty could not compel him to do so, or to deliver to him the deed for the purpose, nor could any one else. Nor could the sovereign enforce it criminally. There seems therefore to be no specific right directly and necessarily created by this rule, and vested in some ascertainable person or class of a particular description.

The fact is, that there is an enormous body of rules of law the direct effect of which is not to confer an interest or benefit on any person or body of persons, but to promote the general convenience and to provide against remote public inconvenience. In all such cases we cannot say that the law confers any *right* unless by a needless straining of language. For it will hardly do to say that it confers

the right on the public. The public in this case can only be the sovereign, and according to Austin's theory the sovereign cannot confer a right on himself. Besides, all laws *ex hypothesi* exist for the public convenience. Laws would not be passed unless the public good required the conferring of the right. And more, this public interest cannot amount to a legal right. A legal right is one which some party can enforce by process. But if a deed of gift of lands be not enrolled in due course and within due period, no one could enforce this being done by process. Nor can the public or the State enforce it. There is no criminal breach of obligation. The test of the existence of a legal right is the power of some person to bring an action to have it maintained. In the case of such non-enrolment, of non-attestation of a will, of attestation by legatees, and thousands of such cases, no one can bring an action, nor can the sovereign prosecute criminally. There is consequently a civil law, but no legal right. In other words, in the civil law right and obligation are not strictly correlative, do not directly and necessarily imply each other in every conceivable case.

On the other hand, there are rules of law where the right is very prominent, but where the legal obligation is in an extremely potential form. There is a rule of law that persons holding certain property are entitled to vote, say, for parish officers or members of Parliament. This rule of law confers a right, a right against the world, in Austin's language. But where is the obligation? An *obligation* is liability to a *sanction*; a sanction is an *evil* to be endured. Who is made liable to an evil? What is the evil? All we can say is that all subjects are commanded to abstain from preventing persons so qualified from exercising their right to vote. This is singularly indirect and circumlocutory. And does it amount to more than the general postulate

of all law, viz. that every subject is required to abstain from acting in contravention to any rule of law whatever? But this is not enough. Suppose men to use every effort short of force to prevent persons from duly exercising their right, what is the evil they have to fear? And if there be no legal evil, there is no legal obligation. An effort in general is not enough to call out any sanction. Of course if men forcibly obstruct persons exercising their right, or officials recording the vote, or being officials refuse to accept it, some evil might be incurred, but it would be under some other rule of law with its own specific sanction. The sanction would hardly be incurred under *this* law.

Again, the rules—*what is directed to be done has been done; forty years shall give good title for specified purposes; no action for debt shall be brought more than six years after acknowledgement; the rules of inheritance or the rules under the Statute of Distributions; the rule that an agreement without consideration is invalid; and thousands of such rules, may be said indeed to create an obligation, but only by a violent straining of language, or else the obligation is simply that general obligation which all law implies to conform one's conduct to the law. There is no specific obligation, to do or to forbear from doing anything, discoverable in the rule of law itself. And the sanction or evil is nothing discoverable in the law or rule itself. It is nothing determined or determinable. The only evil to be feared arises in the possible case of some interest of some person being traced back ultimately to depend on a fact which implied violation of the rule, and which interest is therefore prejudiced by enforcing the rule.*

It is very easy to say that the law punishing theft with imprisonment implies a *command* not to thieve, an *obligation* to abstain from thieving, a liability to the evil of imprisonment (or *sanction*) if that obligation is violated. Over and

above this, there is the general rule of law to abstain from any responsibility for, or complicity in, any act founded on theft, under the general sanction of having that act set aside to your prejudice. It will be seen that there are a multitude of rules of law which admit only this indirect, and not the direct, form of obligation and sanction.

Laws purely permissive—and these are ever increasing,—laws declaratory—and under this head we may bring a mass of rules of judicial interpretation or for judicial guidance: rules of procedure, rules for public convenience, rules conferring faculties, and rules conferring privileges—cannot (without such violence to language as makes it worthless) be brought under any strict partition of all law into rights and obligations.

We may feel some doubt as to the famous position which Austin emphasizes, that the sovereign never can be subject to law, can have no rights, can lie under no obligations; that a sovereign government has no legal duties, and cannot have legal rights, as respects its subjects. This will prove to be a matter of language. And it seems to me that it directs attention too exclusively to the element of *force* in the theory of law. If we conceive law as a *regular* and constant rule which is enforced in law courts, it is hard to see any objection to the supposing that rule enforced even to the particular loss or detriment of the sovereign or State. Force has to a great extent disappeared in modern societies from the sphere of law. And if the sovereign consider that his general good is best attained by acquiescing in the observance of any general rule, we need not abandon the ordinary language of law in cases of claims by or against the sovereign. No doubt the sovereign or State, being supreme, might refuse to execute any rule of law or the decision of the judge to its own loss. But the State might equally refuse to execute any other

decision. The State, it is said, is not bound by any law, because sooner than submit to the sanction, it will repeal the law or ignore the right. But the State can repeal any law, and ignore any right. And it is contrary to the facts to say that the State will not submit to the sanction, or will ignore the right.

The State exacts the sanctions and enforces rights, to its own loss, when the rights are judicially declared and the sanctions are legally incurred, precisely as it does in the case of two litigant subjects. If the Sovereign State borrows money at 3 per cent. it incurs a legal obligation to pay 3 per cent. and confers on the fund-holder a legal right. As a matter of fact, if a creditor of the Sovereign State be not paid what is due to him, he can sue the Sovereign State for his money, and on proof of the debt due the court will decree payment by the State, and the State will enforce payment by the usual process with some slight differences in form, precisely as if *A* and *B* owed and lent the money. I see no use in denying that this is a legal right and a legal obligation, because the right is against that corporate body, which ultimately makes the laws and executes, or causes execution of judgements. It is true the State might pass a law that nobody shall pay his debts, or that the State should not pay its debts, or it might simply decline to execute judgement or to suffer the decision to issue in process. But it might do all this just as much if *A* sued *B*. Every legal right implies that it exists subject to the conceivable possibility of the State abrogating the right, or refusing to give it effect. So long as the courts continue to give legal validity to a right, and so long as the executive continues to give legal effect to an obligation, we ought to call the one a *legal* right, and the other a *legal* obligation. And it is of no importance that, in certain cases, the State may have a grotesque kind of temptation to cease to respect

the legal right, or to cease to give effect to legal obligations. More especially since in all civilized countries it passes as a matter of course that the State pays no heed to the conceivable temptation, but carries out the decisions of the courts, exactly in the same way, whether it have a special interest in the case or not.

The distinction between rights *in rem* and rights *in personam*, an improvement on the classification of the classical jurists into *dominia* and *obligationes*, which was invented by the later civilians and has been so properly insisted on by Austin, is undoubtedly a distinction of great importance. It is clearly more logical than the classical distinction, and is in every way more accurate for analytic purposes. A legal right *in rem*, which a determined party has, and which every one is bound to respect and to abstain from disturbing, and a legal right *in personam*, which that party can enforce against some particular party, do essentially differ in nature; and the distinction is one which exhausts the sphere of rights. But then we must remember that it is a purely *analytic* division. The Roman division into *dominia* and *obligationes*, on the contrary, is a concrete or practical division. Now it is important to keep in view that this analytic division, and, in like manner, most of the analytic groupings of Austin, have only an abstract or logical value, and that they are usually inapplicable to the concrete purposes of technical law. This observation applies to a great deal of Austin's discussions. His division and the Roman division are not in the same sphere. And in criticizing the grouping of the Institutes, of Blackstone and of others, he seems to forget the totally different purposes which he and those writers had in view. His business was to give a logical analysis of legal ideas. Their business was to arrange the rules of law into convenient groups of kindred subjects. But logical analysis cannot be

made the basis of a practical arrangement; nor can the *corpus iuris* in any system be classified with reference to a purely logical analysis.

Jurisprudence can be placed no higher than a systematic arrangement of rules established by practical convenience; and the attempt to base it on psychological principles, or theories of abstract logic, seems arbitrary and quite illusory. Practical convenience is the source of law; and technical convenience is the aim of all classification of law. The attempt to force metaphysical precision on a body of technical rules would be a mischievous form of pedantry.

The analysis of rights into those which avail *generally* and those which avail against *specific* parties is exceedingly useful to clear the head. But a little reflection will show us that these rights are inextricably mixed up in many legal subjects, and are continually giving rise to each other, or mutually interchange with each other. Take the simple case of *sale*. It is clear that the rights *in personam*, invariably arising from the transaction, are bound up with rights arising from the title to goods *generally* which arises on completion. The same may be said of mortgage, when we look at mortgage rights as a whole, taking in both the mutual rights of the lender and the borrower and the title which the mortgage affects. The rights of a parent over children also combine rights of the general and of the specific class. The rights of the husband over the property of the wife are analogous in the sense that out of the same event arise the rights which the husband has in respect of the wife, and those which he has generally. The entire body of law of succession necessarily introduces a similar commixture of general and specific rights. Of course partnership does, or may do, the same. Indeed, there are very few titles in law in which there would not be found some admixture of rights general and rights specific.

There would be an incalculable inconvenience in practically separating the body of rights which are general from those which are specific. Instead of having the body of rules relating to partnership, to sale, to mortgage, brought together in accessible groups, we should have a statement of general rights arising on sale, and at the other end of the *corpus iuris*, specific rights arising on sale. Thus at one end of the code so framed we should have the rule that the sale of a specific movable is a conveyance, and transfers a general right of ownership, and at the other end of the code would come the rule that the buyer has a specific right *in personam* against the seller to compel him to complete his title.

It seems to me no answer to this objection to say (as I understand Austin to do) that there is a sort of ambiguous zone, a class of subjects which cannot be arranged under this division of rights. Examination would show a very large proportion of legal subjects which comprises both classes of rights. The division of the Institutes, pretending to no such logical accuracy, can divide its groups of doctrines into those which relate to ownership (with the transfer, subdivision, and acquisition of ownership) and those which relate to transactions between specific parties. And using this practical distinction, Gaius and Justinian are not troubled by the fact that under ownership come many doctrines which relate to contract, and under obligation many doctrines which relate to ownership and general title. The broad divisions of legal subjects are as old at least as Gaius, and probably as old as Cicero and his masters in the law. They have in some sort been the basis of every system of jurisprudence which the world has seen. They have passed into the mental habit not only of the jurists of every system, but of the ordinary thought and speech of laymen in every race. It would breed the worst kinds of

confusion if the distinctions proper to abstract analysis ever came to supersede the old distinctions of practical classification.

If we were to follow out in the arrangement of a body of law the analytic schemes of Bentham or Austin, we should open our code with rules as to general rights of protection of the reputation; then we should have a portion, but not the whole, of the law relating to family; next the law of ownership, and with it the law of servitudes; after that, according to one view, the law of mortgage; next the law of contracts; then the rest of the law of persons—that is, of parent and child, husband and wife, of trusteeship and guardianship; and lastly, inheritance, succession, testaments, and legacies, and, I presume, bankruptcy. There can be no useful purpose in thus recasting the *corpus iuris*, when for the sake of some logical consistency we sever the rules of law which have been always associated, divide the law of family into two, end with legacies, and begin with the law of libel. The great masters of analysis are often blind to the havoc which they make in practical convenience, when they seek to make logical distinctions bear the weight of working classification and practical divisions.

There is, I think, a perfectly sound reason for the collapse of any attempt to divide law (or indeed anything else) on any strict theory of rights. Of all constructions of the human mind the doctrine of Right is perhaps that idea which has led to the greatest amount of sophism and equivocation. A philosopher has proposed to expunge the word Right altogether as a mere source of confusion. It is in moral and political science that the principal confusion of *right* has arisen. The source of the confusion is sufficiently obvious. Right is a word describing the claim of a particular person or body of persons to have some advantage or interest appropriated or specifically secured to him or them. But in

moral and political things, as indeed in almost all human things, the particular person can only be contemplated as a social being, one of a complex society, and everything he does or has involves the element of co-operation with, or association with, other social beings. Every advantage or interest of such a social being is necessarily entangled with the advantages or interests of other social beings; is limited by their similar rights; and implies the equivalent tribute from the individual of their rights to others. In a society, like that of man, perpetually changing and advancing, the equation, as it were, between the rights of *A* and the rights of *B*, *C*, and *D* is perpetually varying. And, what is more, to secure *A* in an absolute way his specific advantage may involve the utmost injury to *B*, *C*, and *D*, and, very likely also, to other advantages and interests of *A* himself.

The reason why *right* is a claim so formidable and often so suicidal I suppose is this—that right implies the severing out of the common stock of human advantages some portion, and appropriating it individually to one person. But since human advantages are a sort of common stock, the result of common co-operation, they are very often only to be enjoyed by not effecting this severance into portions. To insist on *rights* is thus like insisting on the partition of something held in undivided shares, the advantage of which thing is destroyed by the partition. Thus if the three co-owners of a house, or a horse, or a steam-engine, insisted on exacting their individual rights, and on severing and appropriating the advantage of each by taking one-third physical part of the house, or the horse, or the engine, the advantage would disappear, and the right of each would end in the injury of all. No doubt it is for the common and individual advantage that a certain qualified or relative advantage should be appropriated to individuals within certain limits. But there never is any unlimited appropriation without reference to

any other advantage. That is to say, there is no absolute right in fact. All rights are equally *qualified and relative*. In other words, if right means absolute appropriation, there are no strict rights. All rights exist subject to the qualification that they do not become incompatible with other rights. A man has a right to his liberty, provided his liberty to use his hands in perfect freedom is not found to infringe on other people's liberty, or the enjoyment of person or property. And so the right of free contract is limited by a number of qualifications. There is really no such thing as a pure or true right. Every claim of an individual in a state of society to any personal advantage is necessarily limited by the qualification, that the appropriation to him of that advantage is not to be incompatible with the advantages and interests of others in the society.

In morals and in politics the doctrine of *right* becomes such a network of qualifications, counterpoising duties, and compensations, that nothing solid can be based on it. But in law (and from law the notion of *right* undoubtedly invaded the other provinces) *right* has more meaning. In law, *right* means that a Court of Justice will compel all men to yield you the particular advantage guaranteed to you by public rules, or that it will compel some given party to do so. And in law the right is very nearly absolute. Usually a Court of Justice will compel men to yield you your legal advantage, without on the other hand compelling you to yield any corresponding advantage, and will secure the enjoyment to you however socially mischievous be your use of it, and however much it injure you or injure others. For instance, the owner of a pigsty could not in law be forced to sell it even for £10,000 to allow a railway or an embankment to be made, unless the pigsty were within the lands to be taken by an Act. And law courts would not interfere if the owner in fee simple of a forest set it on fire, or if the owner of an

estate sowed his corn-land with salt. Still we can easily see that this is not really carried out in an absolute way. The law of nuisance, of obstruction, public convenience, and the rest; the rule that one who comes to equity must do equity; the rule that the court will not order certain things to be done if they will injure to a given extent certain persons or the public; the rule that the court will never altogether lose sight of public policy: all these show that even in law *right* is never quite absolute.

Hence, even in law, *right* never means more than that the courts will enforce a given claim to an individual advantage, provided the doing so does not work some countervailing disadvantage to others of overwhelming and specific kinds. But it is clear from this that law must include a great deal which is not within the sphere of right. Law is not simply concerned with the securing to certain individuals or groups of individuals certain advantages or goods. Law in the widest sense exists for the purpose of securing the general welfare of the community. Let us ask any practical man the question—What is a law? apart, for the moment, from any analysis of law into command, obligation, and sanction. A law, he will say, is obviously a general rule as to some physical act or thing which law courts require to be observed in the common interest of all. Of necessity this must include a great number of rules which are not, or, at least, are not directly, designed for the securing of any particular interest of any individual (that is for any right). The entire group of rules or provisions of an instrumental kind—definitions, general maxims of law, the whole of procedure, the rules as to the machinery and form of the material acts or things which come within the survey of law, rules for the general protection of the public, and thousands of others—will have no direct purpose except that of providing for the general convenience by enforcing a common observance. If we say

'every will must be in writing', or 'every cheque must bear a stamp', or 'the agreements of trades unions will not be enforced apart from specific legislation', &c., &c., it seems an idle waste of ingenuity to force any of these rules into a form in which they might seem to create rights. What they do, and what they profess to do, is to provide a fixed rule of observance with a view to public convenience, and no doubt with a view of ultimately simplifying rights and possibly of protecting rights. But since rights both *in rem* and *in personam* may ultimately arise or may be protected by any of these rules, any attempt to use 'right' as a basis for classifying all law, or all civil law, will certainly fail.

A considerable part of the notes of Austin's lectures and of Bentham's treatises are taken up with discussions as to the proper position of this or that portion of the law in a general *corpus iuris*. These discussions are, I think, most useful, if we look at them as intended to clear the head, and as keeping the mind of the student continually open to the idea of some kind of a classification, and of a possible *corpus iuris* of some kind. But the discussions do not seem so useful if we look at them as a practical scheme for arranging all or any law in a code, much less in a code of English law. Of course in English law there is at present no sort of serial classification at all. To the practitioner it is a matter of as little importance whether the law of testamentary succession come before the law of contract or follow it, as in what local order the text-books stand on his shelves. And in the at present inorganic condition of English law, any actual scheme of classification as a working plan is rather premature. Certain changes in the substance of the law, not greater than those which our generation has witnessed, in the reform of real property law, in the Judicature Act, and in Bankruptcy, might seriously modify the scheme in which English law ought to be arranged.

If it were enacted that real estate should pass together with personalty to the executor; if the division of movable and immovable property were substituted for that into real and personal; if mortgage became a real charge, instead of a conditional assignment of ownership, these or analogous changes in the law might seriously alter the mode in which the law under these heads should be arranged.

But it seems more than doubtful if any general scheme of classification of law can be devised equally applicable to all systems. That certain principles of classification may be laid down, as extremely useful guides for systematizing any given body of law, is no doubt certain. But systems of municipal law differ so much that we may fairly doubt the possibility of any common classification. A mortgage in English law differs totally from a mortgage in Roman law; bankruptcy has proceeded in various systems on all sorts of bases; theft at Rome gave rise to a civil action; libel may in English law give rise to civil or criminal proceedings; testamentary succession has been founded, and may be founded, on a variety of theories. Where large portions of any given system of law may have cardinal principles so remote from those of the corresponding portions of other systems, it seems hard to assume that there can be any single and universal scheme of classification. The arrangement of the *corpus iuris* of any system ought to depend in many things on practical convenience. It will be illusory to attempt an exact distribution of it by logical analysis of an abstract kind. And for practical reasons it is of immense importance to respect those practical methods of grouping which are familiar to lawyers and laymen, and which have been sanctioned by so many centuries of actual experience.

CHAPTER III - 27 pages

THE HISTORICAL METHOD .

WHEN the intellectual characteristics of the last century come hereafter to be contrasted with those of the ages preceding, this period will, perhaps, be chiefly remembered in the record of human thought as an age of historical activity. In every department of thought the historical bent was manifest; and nowhere is this more true than in law. The historical method in law is the special resource, and almost the discovery, of our immediate time. And it is important for the lawyer to recognize its proper use and its available limits.

A few words as to its own history. Although there are some indications of the use of historical explanations in law in some earlier jurists, such as Bodin, Bacon, and Grotius, nothing like a distinct conception of a methodical application of history to law will be found, I think, earlier than the latter part of the seventeenth century. Even then, it is only a single suggestion which was followed by no practical result. But a definite, though brief, statement of the conception is to be found in the very extraordinary work of a very great philosopher, in the first essay of Leibnitz. The *Nova methodus discendae docendaeque iurisprudentiae* was published in 1667 by a young man of twenty-two, under the following circumstances: Leibnitz had applied to the University of Leipsic for a dispensation to grant him the degree of doctor before he had reached the legal age. The permission was refused; but the University of Altorf having admitted him, he

published a short essay as a proof of his competence, in which he entirely reviewed the whole field of jurisprudence. On the boldness, the depth, the learning of this most astonishing production of a young student, we need not now enlarge. Suffice it to say, that it sketches the entire
 ↓ reconstruction of the form of the *corpus iuris*, very much in the sense in which it has been reconstructed in the eighteenth century. For the moment, the important point is that he clearly expounds the use of the historical method in law.

That will be evident from his making the historical side one of the parts of law, and devoting to this a distinct section of his short work. He writes: 'We have hitherto been treating only the didactic side of jurisprudence, we must now pass to the historical side. The history of jurisprudence is either the *internal* or the *external* history. The former is that which deals with the substance of jurisprudence; the latter is only subsidiary. The *internal* history of law is that which examines into the laws as adopted in various states.' He then goes on to prove the importance of tracing these along with the external history of the states. This division of his into the internal and the external history of law has been ever since adopted on the Continent as a useful mode of distinguishing the history of the changes in rules of law from the history of the political circumstances which brought about those changes of law. It is the former obviously which is the essential part of legal history. The history of the law of real estate in England, from the Statute of Uses to the Abolition of Fines and Recoveries, can be treated in a connected way without any necessary reference to Henry VIII, the great Rebellion, or the Reform Act.

'By the help of God', cries the aspiring genius of this wonderful student, 'I will some day compile a complete

panorama of law (*theatrum legale*), wherein shall be arranged in parallel columns the laws of all nations, of all countries, of all ages.' The genius of Leibnitz was not, indeed, destined to realize this vision; it was ultimately devoted to philosophy, science, politics, religion, rather than to law. But it is plain that he had even as a student of twenty-two distinctly realized the idea of an historical method in law, and in the catalogue which he drew up of the things yet needed in law, we find set down in express words, 'the history of legal changes' (*historia mutationum iuris*).

For more than a hundred years this youthful conception of Leibnitz remained as a simple conception; for I think nothing like a real attempt to treat the history of law in any systematic way can be discerned till the latter half of the eighteenth century. Montesquieu indeed, who was himself a judge, whose work is called the *Spirit of the Laws*, and who undoubtedly had the historical genius, touches upon the history of law, but he does not add much to it. His book (1748) is essentially a work on political philosophy, the relation of governments and manners. Yet it is full of scattered remarks on the history of law, though rather on what we have called the *external* than the *internal* history of law. His mind is occupied with the changes which certain laws have exercised on certain states of human societies, not on the changes which certain societies have exercised in the growth of law. But he has whole chapters devoted to the history of law, in the true sense of the word; and the twenty-seventh book, devoted to the development of the law of succession with the Romans, may be taken as an excellent specimen of the historical method of law in our modern sense. I have already spoken with regret of the unlucky attack by Austin on the opening sentence of the *Esprit des Lois*, respecting the generalization of law as the uniformity of constant relations in the

physical and in the moral world. Austin overlooked the words of Montesquieu, that this was the meaning of law in 'the most extended use of the term'—we may say, in the sense of the Duke of Argyll's *Reign of Law*—and obviously it excluded the law of the lawyers. The passage itself which opens the *Spirit of the Laws* has been called 'one of the finest that was ever produced by the genius of man', and perhaps there is ground for the eulogy.

A far more direct effort in the way of the history of law is to be found in the famous forty-fourth chapter of Gibbon's *Decline and Fall*. This, so far as it went, was a really complete and successful example of the historical method; and somewhat strangely it has had more influence on the Continent than it has had in England. Gibbon (1776–1788) took the important step of breaking up the thousand years of Roman legislation into the characteristic four epochs which, with some modification, have ever since remained the essential periods of division. The limits of his work did not enable him to carry his treatment very far; but the firm and masterly hand which drew this flying sketch of the entire history of Roman law in its internal as well as its external aspects, traced in it one of the landmarks in the progress of jurisprudence. As an *aperçu* of this vast subject reduced to the compass of a few pages, this marvellous sketch will long remain unrivalled. And, although Gibbon's purpose was to give a vivid conception of the scope and potency of the Roman law as a whole, rather than to treat in detail of any single title, he has done something, especially with respect to the laws of persons and status, to supply us with examples of the historical method of explanation.

The increasing importance of the historical point of view during the latter half of the eighteenth century, and perhaps the effect of Gibbon's work in Germany, led

to the foundation of a distinct school of historical jurists, one which is always associated with the name of Hugo (1790). Hugo wrote an elaborate work on the history of Roman law; and distinctly conceived the historical method, and systematically applied it. With him were associated Haubold and Cramer, and the result of their joint labours was the formation of a large, enthusiastic, and learned school of historical lawyers, and, what is perhaps still more important, the preparation of the field for the historical genius of Savigny, the most eminent master of that school.

The scientific treatment of legal history is indeed so completely associated with von Savigny, that, however much we may trace some earlier examples of the method, the appearance of Savigny's work on *Possession* (in 1803) marks a distinct revolution in the study of jurisprudence and the complete proof of the value of the historical instrument. This admirable work was a crucial evidence that whole chapters of Roman law could be unlocked only by the resources of historical analysis. By it a large section of the *corpus iuris*, the right understanding of which was admitted to be an almost hopeless problem, was solved and solved completely, by means of a patient comparison of the historical conditions of the problem. And the indirect results of Savigny's analysis of possession were perhaps more important than the direct results by which he cleared up the meaning of a mass of texts.

But the next great work of Savigny, his history of Modern Roman Law, bore fruits even yet more important. In proving the continuity of Roman law, from the Twelve Tables down to the close of the Middle Ages, he gave historical evidence of the unity of the civil law in ancient and in modern times, which had been often suspected and partly traced, but was never thoroughly ascertained. Few

readers now go over the immense array of learning in which he proved that Roman law had a living history after Justinian, as long, in lapse of time, as its history down to Justinian. But the effect of his work, once done, was felt in a vast extension of the field in which the history of law was to be sought.

The discoveries of Roman history made by Niebuhr, together with his discovery of the MS. of Gaius in the chapter-house of Verona, in 1816, completed the effect of the historical researches which gather round the name of Savigny. Through them our knowledge of the Roman law has been almost entirely recast, and the critical examination and rearrangement of the whole *corpus iuris* has been successfully achieved. It has been worked out almost exclusively in those countries where the Roman law is the substantial basis of the municipal law. Perhaps until of late years it was too much absorbed with Roman law proper. But at length, after two hundred years, the dream of the youthful Leibnitz has been realized; and, so far as Roman law is concerned, the new method of learning and of teaching jurisprudence has been successfully established and organized.

The next step in the progress of jurisprudence undoubtedly came from England. We have already spoken of the work of Bentham, which was in a very small degree historical, animated as it was by furious antipathy to the prevalent and established legal theories. The work of Austin was, in an incidental way, often historical, but he cannot be said to have developed much the resources of the historical method. For that we must look to the most modern historical school in England, which is associated with the name of Sir Henry Maine. The famous lectures on Ancient Law undoubtedly mark an epoch in the course of the historical method. We must connect them in the first place

with Austin, for we must remember that the lectures were a direct continuation of the same educational scheme in which Austin had taken part twenty years before; and we may connect them with Austin by repulsion, as it were, for they were inspired with the aim of finding a wider basis for jurisprudence than the purely analytic method allowed. ✓

The new feature which was introduced into the historical method by the lectures on Ancient Law was the widening of the area in which the historical elements of law were found, in the special use of Indian examples, and the fruitful comparison of Indian with primitive and classical analogues. In *Ancient Law* we have for the first time the effect of familiar legal institutions or doctrines traced in all the ramifications of the widest field of history, and the juxtaposition of the most unlike types of society, with a freedom of comparison that not seldom recalls Montesquieu. The great German historical school had illustrated the history of the Roman civil law, and of the whole civil law in its modern form, with truly exhaustive learning. It was reserved for the English historical school to trace the elementary institutions of law into the most varied types of early and Oriental society, and to exhibit them as the base of the most dissimilar facts. By a great fertility of illustration we have a common ground established in sources as disparate as the following: The poems of Homer, the Commentaries of Gaius, the theories of Rousseau, the habits of Indian villages, the casuistry of the theologians, the scruples of Lord Eldon, and the practices of Irish cattle-stealers. The historical method, it was clear, ought not to limit itself to the simple history of the *corpus iuris*; and it might usefully search for materials amongst countries as remote as possible, in time or in space, from the *corpus iuris* as from ourselves.

But there is one special advantage possessed by England, which was a practical rather than a literary advantage. By the possession of India Englishmen were brought into a special familiarity with the facts of Indian and Oriental civilization, which was in itself a mine of suggestion for the illustration of ancient history and early law. But if this were all, it would have been of minor importance, as the written accounts of Indian history or custom were available for the learned in all countries alike. The value of the Indian position of England was this: there was a practical task before us, the task not so much of understanding and explaining Indian law, as that of constructing an Anglo-Indian law—of putting our own law into a shape in which it would be suitable for an Indian population, and could be easily administered by a class of officials who were often political officers rather than professional lawyers.

We have to do in India a work which has a curious analogy with the growth of the Praetorian law of Rome. On a far larger scale, and in a far shorter time, we have had to create a system of jurisprudence which would retain all the essential features of our own law, apply it to the case of a vast population having habits and institutions differing from our own, and which would be free from all that is local and historical in English forms. We have thus created, as it were, a real *Ius Gentium* out of our own civil law. But we have had one additional task from which the Romans were free. We have had to codify and recast our own law into a systematic form before we could present it to people who had not our English citizenship. The Romans found their law in a more or less organic form before they began to adapt it to the *peregrini*. This is the feature which has had such immense results on English jurisprudence. As at Rome, the revised

civil law, when adapted to the general wants of all other people, was found to be a law which, in symmetry and arrangement, was far in advance of the old type; so in the process of casting English law into methodical and scientific shapes for the practical use of the Indian races, it was found that a powerful light was thrown on the best mode of transmuting our home system into scientific and more modern form. The names of Lord Macaulay, Sir William Jones, Sir Henry Maine, Sir J. F. Stephen, Whitley Stokes, Sir Courtenay Ilbert, and of all those, both at home and in India, who have worked in the construction and explanation of the Indian codes, remind us how much the law reformers and the law teachers of India are the law reformers and law teachers of England. It is only now that we are beginning to see how completely the reconstruction of the English law into a working type in India suggests to us the necessity and the mode of doing similar work at home. And just as a time came when the Roman lawyers thought that they saw in the *Ius Gentium*, or law common to all nations, the real law of nature, so we may perceive signs of a time when the Indian codes may become, like the Praetorian Edict at Rome, the basis of an English *corpus iuris*. ✓

We are now so familiar with the uses and scope of the historical method that it will be needless to enlarge further on the place it occupies in jurisprudence. We have seen that whole chapters in the *corpus iuris* were unintelligible until they were tested by the historical instrument. The discovery of the work of Gaius has given an altogether new start to the understanding of Roman law. It is when we come to lay side by side the mode in which various systems of law have effected the same purpose, that we understand the analogies between legal artifices apparently far removed. An excellent example of this may be read

in the eleventh chapter of Maine's *Early History of Institutions*, on 'the settled property of married women'. We here obtain, by a comparison of a great variety of legal artifices extending over the habitable world, and the ancient, mediaeval, and modern ages, an insight into the real aim of a great body of rules relating to women's property, such as no amount of direct analysis could possibly have given. It would be hopeless to expect any clear sense of the peculiar rules of English real property without a knowledge of the curious feudal struggles out of which they arose, and the curious game of artifice between the landowners and their lawyers, on the one hand, and the Crown and its officers on the other. So, too, the long contest between the legal and the equitable view of ownership, of mortgage, and the like, and still more the peculiarly English battle between the courts of law and of equity, have half their meaning lost to us until we view them by the light of history, and in particular by the light of the Praetorian law of Rome.

The historical method, it is true, can give us nothing of the existing state of the law as we want it for daily practice. And it is too often forgotten that the careless use of it may even tend to confuse the attention in studying the practice of the day. But then the object of jurisprudence is not to teach the actual rules of practice. Its object is to supply sound ways of grouping these rules, and a scientific conception of their relations and proper end. Now the use of the historical method is just that of pointing to the relations and true ends of legal rules. Any analysis of a body of legal rules of an abstract kind, taken by itself, would be up in the air. It would be thoroughly unsafe until we had tried it by historical canons, and had endeavoured to learn if our analysis could be seen to hold good during all the changes to which the

body of law had been subject, and if it held good in other systems besides the one we were considering. It is the absence of all idea of this truth which was the fatal defect of so much in Bentham's heroic campaigns in law reform.

At the same time it is most needful to insist on the limits and imperfections of the historical method. It would lead to the utmost confusion of thought if we come to regard historical explanations as the substantial or independent part of jurisprudence. In many ways the historical spirit is in strong contrast to the true spirit of jurisprudence. From history we always get ideas of progress, of constant development, of instability. But at law, at any rate for the purposes of the practical lawyer, what we need are ideas of fixity, of uniformity, and simultaneous rule. To the lawyer, the decision of a competent court which formally settles the law is quite as binding as Magna Carta; and it is rather an inconvenience than a help to find any particular rule of law invested with any sentimental or historical interest. A repealed rule of law, even with five centuries of traditional story, is to the lawyer far less important than the simplest and most routine Act of the last session. Fines and recoveries, with centuries of curious legal history, are handed over to the antiquarian. To the lawyer they are a piece of rather troublesome and useless learning. The latest rule of pleading is of far more real value. To use technical language, more in use on the Continent than in this country, the field of law presents itself to the practical jurist entirely as matter of solidarity; to the historian the field of history presents itself entirely as matter of continuity. History has no present; law, in the practitioner's sense, has no past.

Now this presents us with a very real and serious danger, if scientific education in law is at all to tend towards turning our young lawyers into students of history. There

is not much danger, no doubt, lest our practical lawyers should quote Hallam, Stubbs, and Freeman as authorities, instead of Sugden, Jarman, or Smith. But it would be a real evil if our scientific education gave a bent to the student's mind out of harmony with the practical wants of the profession. And there can be no doubt that it would be a thoroughly wrong course to give his mind an historical bent. In history, that which justly becomes the centre of attention is that which has the longest and most unbroken series of influences. And the historical student has steadily to fix his eyes on those influences which seem to be the most enduring. In law, it is just the other way; the lawyer, as such, has nothing whatever to do with what was law a hundred or fifty years ago, or even last session. His one thought must be, the law as it is in the actual year.

An English student of law is peculiarly exposed to dangers of this kind. We have no formal code or institutional work whatever. There is nothing to give a student a general conspectus of the law as it is. The student of Roman law always had, as he has now, the Institutes of Gaius or of Justinian; the French lawyer has the five codes, and so forth. But the only institutional work of thoroughly classical position is the famous book of Blackstone; and the first thing the student learns of Blackstone is, that one-half of it is now superseded, and must be interpolated and supplemented with more modern passages. He then reads Austin and Bentham, and Maine, and learns from them that almost the whole of Blackstone's theories are wrong. The result of all this is that Blackstone's book comes to wear a purely historical character; and, of course, the larger part of Bentham's attacks on the law have now that character also. In this way, the first view of English law obtained by the student is that of a mass of famous histo-

rical doctrines which are now more or less obsolete, and a moving panorama of reforms, amendments, and repealing statutes very bewildering to the mind anxious to form an idea of the law as it is.

There is, too, another inconvenience in the historical way of regarding law. What Leibnitz calls the internal history of legal change is not always, and indeed not very often, determined by purely internal causes. That is to say, that purely juristic considerations, or motives based on scientific views of law, only partly decide the form which any chapter of law shall take. In the earlier development of law this may be said never to take place. At any rate, until the latest stages of the law of any society, the *internal* history of their law is more or less determined by the *external* history of it; that is, the political conditions of the legislating authority. All this is very often most alien to the scientific aspect of law. And thus purely political and social reasons produce great landmarks in the history of law which, from the point of view of the scientific jurist, are curiously unimportant. The rules of law, for instance, relating to *mancipatio* and all its consequences, from the historical point of view, are of the most cardinal importance in Roman law; but they are simply a source of disturbance in the symmetrical and scientific view of Roman law; and to the student of the complete form of that law they entirely disappear. So, in our own law, from the historical point of view, the conflict of law and equity, and the feudal doctrines of seisin, of uses, of pleading, are the really central points of survey. But they have now lost all importance for the scientific lawyer. Thus the historical method, if left unqualified, is perpetually tending to carry us off the field of law into the field of social history or political antiquities.

I am disposed to think that our study of Roman law is very often diverted by this very tendency. I should myself

be the last person to undervalue the work of clearing up our study of Roman institutes by the light of history. But, if our study of law is to become simply a study of history, I am inclined to think that it ceases to be true law. The student loses the sense of symmetry and unity in the Roman system, and has an impression of it such as it never really was at any time in its history, and least of all in the time of its zenith. His mind is too often occupied with questions which to a lawyer, even of the age of Gaius, would have had a merely antiquarian interest; and which were no doubt utterly unknown to Tribonian himself. The mass of learning about the real meaning of *nexum*, the fragments of the Twelve Tables, or the procedure *per pignoris capionem* is interesting and suggestive; but it is hardly Roman law as the great age of jurists understood law, or as it has influenced the entire history of subsequent civilization.

We ought never to forget that the Roman system, as practically closed soon after or about the time of Diocletian, or the abolition of the formulary system, and eventually digested by Justinian, has remained for more than thirteen centuries essentially the basis of the law of the larger part of civilized Europe. During the whole of this period, as for centuries before even the earliest of the great Roman jurists, Roman law was entirely free from these antiquarian curiosities current in the law of the kings and the early republic. And, much as I welcome this knowledge as a part of the history of Rome, and even as an illustration of the history of Roman law, we ought to remember that it is the study of antiquities, not of law. And I believe that such study had better succeed, rather than precede, a thorough grasp of the Roman system in its advanced shape. And in this point of view it is almost a misfortune that the work of Gaius is so far superior to the Institutes of Justinian, as a law-book, as well as a work of art, and should justly excite much more

attention ; for the Roman law as it existed at the date of Justinian is a far more scientific system of rules than that semi-archaic system which was condensed in so masterly a way by Gaius.

I think that the great value of the Roman system would be lost to us if we did not lay to heart its first and its last lesson. This I take to be the symmetrical and rational form into which it ultimately expanded, in spite of the confusion which its historical accidents so strongly impressed upon its earlier forms. The position of the full Roman citizens, as a peculiar and dominant race down to the time of Caracalla, was as destructive of scientific law as it was anti-social in a moral sense. The many legal anomalies, chiefly arising out of that anomaly, were a serious blot on the Roman system of jurisprudence. But eventually the genius of Rome triumphed over all, or almost all, of these ancient obstacles. And though nothing in the entire history of law is more valuable and fertile in suggestion than this long struggle out of confusion into symmetry, it would be a deplorable mistake if we allow our eyes to be fixed on the confusion whilst the symmetry of the final result vanishes into the background. The early story of the old anomalies has a very curious interest, especially for Englishmen ; and the literary interest of their origin and transformation is exceedingly fascinating. But I see a real danger to jurisprudence if we allow literary interest to overpower the strictly juristic interest which must always centre round the final and complete system as left by Justinian.

In the same way the questions of modern history, of politics, of the history of thought and manners, into which law enters, and which may be usefully illustrated by the history of law, are strictly infinite. Many of them possess the deepest interest and have a high philosophical value.

But this very literary and philosophical interest, for the most part, takes them out of the sphere of jurisprudence. In proportion as the history of law becomes a part of general history, it becomes more and more history and less and less law. We ought always to remember that when we are illustrating philosophy by the aid of law, we are only incidentally or accidentally advancing the philosophy of law. There is a real danger of our jurisprudence becoming too dispersive when we come to make questions of jurisprudence the text instead of the discourse. When, for instance, we trace some rule of diplomacy or some political theory to a well-known principle of law, we have really done nothing to add to the knowledge of the jurist, though we may have added to that of the historian and the publicist.

What is the practical conclusion to which I would point? It is that the historical method is one of the resources of jurisprudence, not the substantive part of it, and in no sense an independent part of it. It would be possible to have a very great and varied knowledge of the history of any legal system, and yet never to grasp it at all as a coherent and symmetrical scheme. For the lawyer the great interest always must be what is the law as it is. How it has become what it is, is a very useful inquiry. But this will become positively confusing if the subordinate inquiry is ever allowed to stand on equal terms with the main inquiry—the law as it is, as it is at any given time. The historical part of the study is necessarily followed out in sections. Particular titles, succession, contract, and the like are detached and their special history ascertained. But the result, to the overburdened memory of the student, is too often to lead to a spirit of legal anachronism thoroughly hostile to the really legal mind.

Many a student who can give a very sufficient account of the successive changes introduced under any given title,

would be very much puzzled to give a general sketch of the state of law under all of these titles at any one time. Yet the business of the lawyer is with the synchronous, not the successive states of the law—the solidarity of it, not the continuity. It is common to find students who have mastered the intricate, and I think almost worthless, rules about the various classes of Roman citizens and the succession of their property, or the purely accidental rules as to intestate succession generally, and who feel almost as a loss of interest the simplification of these rules in the ultimate legislation of Justinian. In the same way, the curious history of *mancipatio*, of *res Mancipi*, of the *legis actiones*, commands a degree of attention, and occupies time and thought wholly disproportioned to their real importance. It is desirable to know how irregular, how arbitrary, and how archaic the Roman system once was; but the essential thing is to know how symmetrical, how wise, how scientifically right it ultimately became.

All this points to making the historical inquiry merely an instrument of jurisprudence and never to take it for jurisprudence itself. Scientific jurisprudence should tend always to look at a system of law complete as a working whole at any given time. The sympathies will be always towards the rational and scientific modes of classification; to the final type of any system, not to its rudimentary forms. The historical inquiry unrestrained constantly tends on the other hand towards the anomalous, the accidental, the initial type of the institution. The only way to guard against this is to use the historical method in jurisprudence strictly and simply as an instrument. In history we usually proceed chronologically from the beginning. But in law we ought to take our final and complete system as a basis, and merely use our history to clear up doubtful points. The only historical problems really useful in law are those

which the jurist finds in his way, and which he needs to have cleared up.

To give practical shape to these remarks, I wish to insist that the Roman law in its final form seems to me the first and the last, the main and real object of study in civil law. Until at any rate the Institutes of Justinian are thoroughly grasped as a whole, I think historical inquiries are premature. The Commentaries of Gaius have been called, and I think justly, the greatest work on law that was ever written; and the discovery of it has undoubtedly done very much for the study of Roman law. But if the reading of Gaius is allowed to supersede the reading of the Institutes of Justinian, we shall really know less of Roman law than our fathers did. In the old days the Institutes as revised by Tribonian stood out as a unique and handy summary of the entire field of civil law. Now the civil law too often is presented as a thing in a state of continual flux. That is not the way in which it is regarded on the Continent. There, the prevalence of the civil law as a working institution leads to its being grasped as a whole in its final form. And my own impression is, that before the attention is strained with the shifting panorama of historical explanations of the *corpus iuris*, the student ought to have thoroughly assimilated the final form of Roman law, as it is summarized in such compendia as those of Mackeldey, Thibaut, Warnkönig, or Demangeat. There we get the civil law of Rome in the same crystallized form as we get that of France in the Code Napoléon.

Foreign students with their codes to start with, and with the civil law more or less in modern use, are not exposed to the same dangers that we are here in the use of the historical method. To them it is impossible that it can ever become an end in itself. We have exceptional advantages for the use of the historical instrument in that we always look at

the Roman and romanized system *ab extra*. We have in our own law a magnificent parallel or contrast to the Roman law; and we have unusual familiarity with the historical method in law, owing to the multiplicity of systems with which our vast empire brings us into contact. But then we have special disadvantages in using the historical method, inasmuch as we have not got a symmetrical jurisprudence of any kind to control and direct it. Jurisprudence is in this country completely an exotic and thoroughly artificial, and it is sometimes little able to manage its own weapons. It is so great a strain upon the mind to build up and retrace the conception of a great body of titles reducible to abstract and symmetrical classification, and capable of statement as a set of consistent principles—and this is what I take jurisprudence to be—that we are perpetually in danger of giving to law a literary instead of a scientific character, and of slipping in our thoughts from what the law is into speculating upon the coincidences which made it what it once was.

The historical method is thus a potent and fruitful instrument of jurisprudence, but it is very far from being the last word of jurisprudence, or the substantial part of jurisprudence. That must always be looked for in the analysis and consolidation of the actual doctrines of law under systematic titles. There is abundant evidence that our English school of jurists are passing far beyond the critical and logical method of Bentham and Austin, and beyond the ingenious suggestions of historical explanation, into the practical work of consolidation and scientific distribution of codified rules. We are evidently in an era similar to that which in Roman law preceded the epoch of Justinian—the era of partial codes and of scientific revision of anomalies. Our law-writers of the higher order are all, more or less consciously, preparing the way for an ultimate consolidation of our system into a form that shall be worthy of its past history. The admirable

work done by Sir James F. Stephen, by Sir H. Thring, by Sir William Markby, by Sir Frederick Pollock, by Mr. Justice Wright, and by many others, proves that our English law has at last come down to 'the root of the matter'.

The root of the matter, I suppose, is the scientific analysis and distribution of our legal doctrines and statutes, and their consolidation into a symmetrical and practical whole. This is, doubtless, a great, and possibly a far distant, work; but it is one that is impossible without a real and sound jurisprudence. And the methods of such a jurisprudence will probably be found to be three, of which no one should exclude or can supersede the others—the analytic, the historical, and the comparative. The first of these will give us the analysis of the general notions of law, its language, logic, parts, and arrangement. This has, on the whole, been sufficiently accomplished by Hobbes, Bentham, Austin, and the modern Germans; though it is unfortunately somewhat obscured in Bentham, and even in Austin, by a perfect *mitraille* of disputations and opinionated dogmatism of the *a priori* sort, such as makes it often tedious and sometimes misleading. The second method is the historical, by which we learn first how rules, surviving in advanced civilizations, are the fragments of ancient habits now almost unmeaning or forgotten; next, how some of the most modern of our legal devices are simple enlargements of primitive contrivance. Thus the intricate rules in modern use form, as it were, a mosaic of survivals—fragments of larger masses of old law ground and cemented together by the trampling of successive generations. And the true history of their gradual formation guides us to the right principle of their ultimate analysis and simplification. The third of the instruments of jurisprudence will be the comparative method by which the grouping, the doctrines, and the expedients of various systems are brought into common relations, and the

underlying principles are extracted. It is, in fact, a systematic and structural analysis of legal doctrines and their due distribution in relation to each other.

With these instruments when thoroughly familiar to us we may form for ourselves a complete jurisprudence equipped for the task before it—the consolidation and systematization of English law. The value of jurisprudence altogether is not seldom contested by the more cautious elders and doctors of the law; and some of us can remember a most eminent conveyancer (we are not responsible for his language, nor quite clear as to the work he meant) who used to warn his pupils against what he called ‘that beastly book, *Justinian*’. But if it be possible to reduce the wilderness of rules which the vast library of text-books presents into a coherent body of general conceptions, the usefulness of it as an introduction to the study seems too obvious for argument. That the rules of law can be exhibited in this abstract, or rather this general form, is capable of direct demonstration. Every practical study is, by the common consent of civilized men, begun by a theoretic study of the general principles on which the rules depend. A practical engineer has to begin his professional education by the theory of mathematics; a practical physician by the theory of physiology and comparative anatomy. No man could be trusted as an economist who had not mastered the universal conceptions of political economy; and a man would be a sorry diplomatist who knew no more of international practice than what is found in Marten’s *Treaties* or Robinson’s *Reports*. The idea that English law stands alone in all the products of human thought and the objects of rational study, in being nobly (or ignobly) independent of any systematic knowledge of general principles, seems a truly melancholy instance of the dogmatism of a low education.

On the contrary, English law is, of all the systems of law,

that one which most requires a scientific introduction by a training in principles. It is of all modern systems the one which has the least scientific form, whilst it is of all systems which the world has ever seen that which has received the greatest amount of practical elaboration. The substantial good sense, the inexhaustible painstaking, and the sober wariness of its provisions can be matched only in the Roman system itself, if they are matched even there. And if it wants the symmetry and logical beauty of Roman law, it has a practical energy and an elaboration of detail peculiar to itself. The very incoherence of form which was produced by its native independence and singular growth has led to an energy of the law-reforming and law-consolidating spirit almost unique in history—one tending in Bentham and in Austin to a destructive and abstract method far too absolute and trenchant. And thus jurisprudence, or the comparison and analysis of legal principles, whilst it is far more necessary for the English lawyer than for any other jurist, is also far more interesting and fruitful to him than to any other; because the English jurist has, in the contrast of the Roman and the English system, the two systems of law which have had the greatest history, the greatest effect upon mankind, and which, using the most strongly opposed methods, and working in the most different types of civilization, have exhibited the greatest subtlety in adapting general ordinances to the infinite varieties of social convenience.

Our English law, it is obvious on the least reflection, is passing through one of the most critical stages of its long and splendid history. During the nineteenth century it witnessed a series of changes greater than any of those it has known, with the single exception, perhaps, of the rise and formation of a substantive system of equity. Since the nineteenth century we have closed the course of growth in

that system of equitable development of the law which for two centuries had built up so fruitful and vigorous a body of principle. The long career of Lord Eldon finally closed the standing edict of our *ius honorarium*; and henceforward, with but slight exceptions, the progress of law has been the work of express and deliberate legislation. About the same time the furious criticism of Bentham, combining, I suppose, with all those influences which we must ultimately trace to the French Revolution and all its social and intellectual consequences, had effected the great series of practical changes in the civil and criminal law which are such striking landmarks in the history of Victoria's and the two preceding reigns. (7)

There are great changes in the law of real property; in the law of wills; in the law of succession; the simplification of settlement and transfer of real estate; the revolution in the law of procedure and of the rules of evidence. One curious illustration of the completeness of the change may be seen by going through the various practical reforms which were demanded in the voluminous writings of Bentham. Hardly one of those things which he attacked can now be found in the actual state of the law. In 1879 we were still watching the process of a change hardly less than any of these—the fusion of law and equity; the final consolidation of the two great systems which have a concurrent yet separate history for so long a period. And along with these great practical changes in the law, a still greater revolution has been working in its theoretical conception. Bentham was a practical law reformer, and probably extremely ignorant of any really scientific jurisprudence. But Austin was well grounded in Roman law; he was well read in the great German critical and philosophical lawyers; and he knew something of foreign codes and foreign conceptions. He introduced into England for the first time the

bases of reformed legislation. And the effect of all these forces working together was such that English law was already brought (quite two generations ago) to the eve of a new epoch in its history.

But we must also remember how very much has been done even within that time; how much is doing under our eyes, quite distinct from, and far in advance of, Austin's work [1879]. Within that time, we may say, an effective knowledge of Roman law has been introduced into the ordinary education of every lawyer by the persistent and enlightened efforts of a series of earnest law reformers. The zeal with which, under circumstances the most unpromising, these men have striven to engraft on the English mind a rational basis of principle, is already beginning to bear fruit. We have now upon the bench great English lawyers who are perfectly familiar with the doctrines of Roman law, in their ancient as in their modern shape; and all the higher class of legal manuals are now distinctly saturated from the same well-spring of principle.¹ And not merely is it Roman law which is thus for the first time visible to English lawyers as a working reality; but a knowledge of modern systems, of continental and American codes, is also common, both with our judges and our higher text-writers. One of the most eminent of our modern judges, whom it is needless to name, because the instance is not at all peculiar, amidst the mass of his technical resources, contrived to keep the rules of the recent Italian codes at his fingers' ends. The present generation, therefore, has witnessed a really striking phenomenon [1879]. This no less than the re-annexation of the English law on to the great body of principle, of which the Roman law is the basis and the framework.

¹ See especially such writers as Lord Lindley, Sir J. F. Stephen, and Sir F. Pollock.

Henceforward the insularity of English law is a thing of the past. Our law takes its place as one of the great schemes of legal principle known to civilization ; strongly marked and peculiar in some respects, but in no sense either abnormal or unique. English law has worked itself free from whole masses of those feudal anomalies and accidents which in the eighteenth century made it seem something so monstrous and hopeless to men trained in the civil law. It never was at any time in so unmethodical a state as was the law of France before the Code of Napoleon, or the Roman law in the time of Cicero. But now that much of the old confusion has been cut away, it is seen that the bulk of the English law is entirely comparable to, and in many respects in complete harmony with, the bulk of the civil law. The law relating to land, to buildings, and to the settlement of estates, and necessarily the law of succession and wills, is from political causes deeply stamped with the history of its feudal origin. It is this startling and picturesque side of English law which has filled the lawyers of England and of the Continent alike with the conviction that English law is a unique production of the human mind. But this is merely the historical casing of our law. Behind this feudal accident, when we study it by a sound analysis, it is seen that the bulk of the English law, the whole *law of contract*, the *whole commercial law* (and this is ever becoming more and more the bulk of the civil law), really, as the old book said, 'runs on all fours' with that modified and modernized form of the law of Justinian which is the groundwork of the law of all civilized Europe. ✓

But there is another influence at work now exerting an enormous influence on English law. Our empire, with its other advantages and burdens, is throwing upon us almost exactly the task which the Roman lawyers had to meet in framing laws for the vast non-Roman population that Rome

governed. We, too, have an immense body of citizens, all of whom we have to govern by some adaptation of English law. In every case the purely feudal portion of our land law has had to be left behind in these islands. The English law, as we know it, depends for its practical existence on the English bench of judges and the English bar of advocates. We are justly proud that neither the one nor the other have ever been surpassed. They have made and make our law, as did the jurisconsults during the splendid period of Roman law. But to the colonies, and especially to our enormous Indian Empire, such a bench and such a bar could not possibly be supplied. The result has been that in order to apply the English law to these outlying people, we have had to simplify it, to consolidate it, and very largely to recast it. Within a very few years we have had from official authority three distinct projects of a complete code of criminal law, all of them, with slight modifications, highly scientific digests of our English system [1879].¹ We live in the era of codifications. It is in the air throughout the whole range of English law. Digests, more or less complete, skeleton codes of portions of law, are multiplied every day. We have just codified, in a sense, or at least consolidated, our statute books. Every session sees us at work upon consolidation statutes. Parliament has now before it a complete criminal code. And I need not say how much codification depends upon, and compels us to, a scientific jurisprudence, whilst, reacting in turn, it stimulates a scientific jurisprudence.

All this tends to show us that a scientific jurisprudence is not now an intellectual luxury, but a practical necessity, for an English lawyer. But it shows at the same time that

¹ *The Indian Penal Code*, *The Criminal Code for England*, drawn by Sir J. F. Stephen, and *The Code of Criminal Law for Jamaica*, drawn by Mr. Justice Wright.

this jurisprudence must go far beyond mere logical distinctions or literary researches; far beyond the precision of language and the analysis of elementary ideas which Austin enforced; far beyond the comfortable rhetoric of Blackstone, and the learned inquiries of the German historical school. The substance of our jurisprudence now must be the systematic analysis of all the leading titles and doctrines which are found in a working code; the reduction of these to a series of digests arranged on a general principle; and the collation of these rules with the bodies of law now governing the lives of people in a state of advanced civilization for their ultimate and final codification.

origins of the Historical School

uses of it at present

Roman system - hist'l method applied

Eng. system - ditto

Eng. law codified.

Historical method, great interest and essential use for, but does not and cannot stand alone must be one of a series of instruments for the final codification of Eng. L.

CHAPTER IV

THE CONFLICT OF LAWS. I.

[WRITTEN IN 1879]

THERE is a department of Law, the first principles of which have been furiously disputed by lawyers; the canons of which are hesitating and contradictory; the sources of which are themselves a matter of argument; having an authority which is most differently interpreted by doctors and by judges; and a sphere which is understood in various ways;—and yet this branch of Law is attaining in our day continual development and fresh importance from a variety of causes, and in a manner often unobserved.

It is far from settled whether it properly falls within the province of public international law, of general jurisprudence, or of forensic practice; it has been treated alternately from each point of view by publicists, jurists, and practitioners; at one time it is regarded as a part of the common law of each nation, at another time it is treated as common to the whole civilized world; there is little agreement whether its older forms have any value for us now, whether its future form can be at all determined by deduction. In any case, its true place in the field of law has an equal interest for the historian of institutions and for the scientific lawyer.

The very name of this branch of Law is far from being determined. Its relation to the rest of Law is even more unsettled [1879]. Its official name is Private International Law; but it is often spoken of as the Conflict of Laws, or the Collision of Laws. The old French lawyers spoke of

these discussions as Mixed Questions ; and the great German lawyer Von Savigny calls them limitations upon law arising from place. Other names have been given to this branch of Law :—the personality and reality of statutes, the diversity of laws, the contrariety of laws, and many similar terms have been used. So great a variety of names shows the uncertainty of the field which this branch of Law is supposed to cover. I venture to think (and it is a common opinion) that no one of these names is quite satisfactory, and before concluding I shall try to determine the most accurate term to describe it.

This Conflict of Laws, or Private International Law, arises in this way. In modern civilized communities, the rules of law, or statutes sanctioned by each sovereign power, extend *prima facie* to all those within each sovereign's jurisdiction, and are to be enforced in all its tribunals—but no further. To give the laws of one sovereign any validity outside the territorial limits of his sovereignty, or to seek to have them enforced by tribunals that do not derive their authority from him, is *pro tanto* to encroach on the sovereignty of the neighbour. But in the complex relations of modern societies, transactions are continually being brought for decision before all courts of justice, which in whole or in part depend for their legal quality on the laws of a state different from that which has to try them. A. B. makes a claim to succeed to an inheritance in England. His parents are alleged to have been married in France. It would be idle to test this alleged marriage by the laws of England ; because they have no authority in France, where the alleged marriage took place ; nor would it be possible to observe them in France, even if their authority there were assumed or pretended. On the other hand, it would be monstrous injustice to deny that the parents of A. B. had ever been lawfully married, because they had not been

married according to the Marriage Acts of England. But this is to say, that English tribunals are often called upon to try incidental questions in causes before them by the rules of a foreign law. Englishmen are constantly settling in foreign countries; they make contracts, assignments, or wills abroad, sometimes whilst settled, sometimes as simple travellers. An English firm frequently engages with a French or German firm to execute some work jointly in Russia, or Turkey, Greece, or Japan. A dispute arises: what law is the court to apply to the contract? Or, in order that no dispute may arise, by what law is the contract to be drawn?

It is obvious that, in the multiplicity of our modern complex society, not a day can pass without questions coming before some court for decision, wherein some element or other has its legal origin in a system of law foreign to that of the tribunal trying the case. Two or more systems of law are thus brought face to face, either, as some think, by way of conflict, or collision, or competition; or, as others think, by way of intermingling, interchange, or courtesy. Which of many codes, or schemes of law, is to prevail; which is to give way? What elements in the case are to be referred to foreign law, and to which foreign law, and under what conditions? And on what general principle is the code of one nation to be treated as valid by the tribunals of another nation; and for what purposes, how far, and under what limitations?

We have here a fruitful field for some of the most intricate problems in law, and some especially which throw us back upon general jurisprudence. And it is plain, that owing to the vast extension of our international intercourse, and to the cosmopolitan character of modern commerce and even of modern life, the occasion for this interchange of laws is perpetually increasing. The Conflict of Laws of course

grows, and will grow, with the growth of international relations, which are far in advance of the uniformity in laws. Whilst the codes remain divergent, the Conflict of Laws must become greater. But this Conflict of Laws has itself become a branch of science, and has been called Private International Law, because it rests upon the doctrine of the equal sovereignty of friendly nations, and the desire of civilized states to treat their neighbours, civilly as well as politically, with equal justice.

The definition and limits of this branch of law, and the authorities on which it is based, rest, I have said, on very different theories. It is called Private International Law, and in the most approved and systematic treatises on International Law it forms a substantive part. In the works upon International Law of Wheaton and of Halleck it occupies an important section. It occupies the fourth volume of Sir R. Phillimore's *Commentaries on International Law*. In the *Revue de Droit International*, the organ of the principal modern international jurists, it is mixed up with Public International Law, as it is in the reports of the Annual Congress of International Jurists. On the other hand, it forms the eighth volume of Savigny's great work on the general principles of jurisprudence. And yet, it is plainly, for Englishmen at least, a substantive part of our ordinary Municipal Law. Its rules are not left to the elastic sanction of public opinion or armed interference; they are determined in the ordinary sittings of courts of justice, whose judgements in this matter are enforced by the usual process.

It will be observed also that it forms in no sense a separate branch of decisions. There are no special courts of Private International Law, as there are for matrimonial cases, or admiralty cases. It starts up unexpectedly in any court, and in the midst of any process. It may be sprung like

a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case, or a matter of criminal procedure. It makes itself heard in every existing court of justice, whether superior or inferior, civil or criminal, and it may intrude, quite unlooked for, into the midst of any part of the jurisdiction, whether substantive, or simple procedure. The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International Law.

And yet when a question of this class arises, it is seldom decided offhand with reference merely to English decisions. Books are cited as authorities which are usually foreign; the decisions of foreign tribunals have frequently to be reviewed. An author such as Huber, a Dutch professor of the seventeenth century, is constantly quoted. American decisions, the codes of foreign countries, public treaties, old civilians, old and modern treatises on International Law, are continually appealed to. Story, Fœlix, and Beaulienois are in constant requisition, and the court will seriously attend to dicta of foreign lawyers writing under systems widely different from our own and from each other, whose notions of jurisprudence rest upon theories entirely contrary to our own. When the student or the practitioner consults for the first time, or for some immediate practical object, such a collection of judgements and opinions as are thrown together in Story's *Conflict of Laws* or by a scientific theorist like Savigny, his first impression will too often be that every possible view has been taken, and may be taken again, on every conceivable branch of the subject; that every dictum is presently contradicted by another dictum; that each country seems to follow its own view, and often does not follow out any view with consistency;

that Private International Law, looked at from the International point of view, is not so much a branch of law, common to civilized tribunals, as a chance medley of contradictory propositions.

The confusion is not indeed anything like so great as it appears at first sight. The amount of agreement, when properly qualified and understood, is far larger than would appear without explanation. But there are difficulties and uncertainties, it must be admitted, even as to the first principles of this branch of legal questions, and as to the methods which are appropriate to solve them. '*Anceps, difficilis, et late diffusa est disputatio*,' says one old jurist—Hertius—of the Conflict of Law—'it is a perplexed, difficult, and widely roaming branch of jurisprudence; so that I doubt if any single lawyer has dealt with it in the whole of its extent.' 'In their definitions of its terms, it is marvellous', says he, 'how the doctors labour'—'*mirum est quam sudant Doctores*.' 'The opinions of writers, as well as the judgements of tribunals, have hitherto been wildly confused and conflicting,' says the great jurist Savigny.

Viewed as a collection of purely English decisions, the judgements of our own courts *per se*, in cases of Private International Law, are in a very considerable degree consistent, positive, and plain. But when we go into these decisions for the purpose of extracting their governing principles, and to apply them, as general rules, to new cases, we find that we cannot understand them, or even get at the *ratio decidendi*, without a good deal of study of jurisprudence wholly outside English reports, and without some knowledge of the great doctrines of foreign jurists. And we shall find also that Private International Law, treated as a body of English decisions, cannot be advanced, or even practically administered, without constant reference to this mass of learning which lies outside strict English case-law.

Looked at from the point of view of any particular system, Private International Law is that part of the Municipal Law of each civilized community which is determined by its relation to systems or rules of law other than its own. It will hardly avail to say, that these extraneous rules are *borrowed* from other systems of law ; much less that other systems of law or foreign rules *overcome* the domestic in the conflict of laws. For it is plain that the whole Private International Law of any municipal system is really a substantive part of that system, and is in no way foreign law or doctrine of general jurisprudence. No part of Private International Law has any binding force on an English tribunal, except so far as it is incorporated in English decisions. So far it is strict *law* in Austin's sense of that term. In spite of its name, in spite of the fact that the two systems are mixed up in so many text-books, Private International Law is here a totally different thing from International Law. It is imposed or adopted by the sovereign national authority ; it is enforced by the same process as the rest of the Municipal Law ; and its authoritative *sources* are English decisions. Moreover, International Law is, broadly speaking, one body of rules for the whole civilized world [1879]. Now each Municipal Law has its own Private International Law, sometimes differing in striking features, and often embodied in its code and statutes.

Yet withal, as a fact, there is very great convergence and unity about these different versions of Private International Law. There are undoubted general principles recognized in all. The convergence grows constantly greater, and the rules of each system cannot be intelligently applied, and even cannot be intelligibly followed, without a clear grasp of these general principles. Thus Private International Law is truly a part of each municipal system of law ; but a part which in great measure is identical in all municipal systems ;

a part which rests on principles more or less accepted by all systems, and which is constantly growing more consciously in harmony with these principles.

Lastly, this is a branch of law which has gained immensely in importance of recent years [1879]. A hundred years ago, the very rudiments of these questions were in England *of first impression*, cases new and unconsidered. The vast increase of communication and of locomotion which characterizes this and the preceding generation—say roughly since the Peace of 1815—has given an enormous extension to these matters. The peculiarities of English law, its special methods of procedure, and of its *sources* of law, and the entire neglect till recently of the civil law by English judges and writers, have created unusual difficulties in the way of assimilating this portion of the legal work of the civilized world. But the last fifty years, even the last twenty years, have done a great deal to bring England into the family of nations on this point, and have shown English judges and English lawyers as labouring hard to naturalize amongst us the only principles on which this branch of law can ever obtain a rational foundation [1879].

The extremely divergent principles on which this branch of law has been based can only be cleared up by tracing historically its order of growth.

It was very early noticed that in Roman law strictly there was no such thing as Private International Law. Huber says, the reason is that the Roman law was extended over so large a portion of the habitable world that conflicts of law could hardly occur. There were, however, under Roman law both local customs and Municipal Laws, and also the practice of recognizing the law properly belonging to *aliens*. And yet there was no true Private International Law in the classical civil law. The real reason of this perhaps is that the Roman tribunals never realized the

conception of distinct but co-ordinate legal systems applying to different races and groups of citizens side by side, each entitled to equal authority, and each lending itself to the other. Private International Law implies a group of states each having legislating powers, with a very similar level of civilization, but having equal and independent sovereignty. This is obviously an idea long subsequent to Roman law.

The old praetorian law did, in its origin, furnish some analogies to Private International Law, at least in the mode in which it was popularly thought to have arisen. It was said that the Praetor, finding the Roman law fail to apply to certain classes of persons and certain legal cases, chose out of the various laws of all nations the rules appropriate to the occasion. This was so far Private International Law that a Roman tribunal administered what were loosely said to be the rules of systems other than its own, and these rules became incorporated as part of the Roman municipal system. It was indeed a little like Private International Law as conceived by Savigny, as a symmetrical body of rules flowing from fixed principles of general jurisprudence, and something like that which is dreamt of by the modern foreign jurists who think Private International Law stands on principles antecedent to tribunals and even national convenience, and may be cast into a uniform code for all modern states.

On the other hand, the *Ius Gentium* was totally distinct from Private International Law, inasmuch as it did not profess to give strict application to other municipal rules; it did not apply these rules to particular features in each case; nor did it rest on the assumption of a number of equal and co-existing sets of municipal rules. Such rules as the *Lex loci rei sitae*, or *Lex loci contractus*, or the rules of *Domicile*, the *Lex fori*, the validity of a will according

to the forms of the place of its making—in fact all the characteristic rules of Private International Law—had no place at all in the law administered by the Praetor. If the Praetor gave effect to a will made without *mancipation*, he did so as part of the Roman system of equity applicable to Roman citizens, just as he had begun by doing the same thing for foreigners residing in Rome who could not use Roman forms. But by Private International Law a modern judge gives effect to a will, not on the ground that it ought to be valid in spite of defect of form, but on the ground that it was made in the form required by the *lex loci* of the testator's domicile, whether citizen or foreigner. And the modern judge recognizes twenty different forms, if properly proved to him, and applicable to the case, however special to any peculiar place or system, and however alien to his own ideas of law and equity. 111

Nothing of this kind was ever found in the Praetorian law, or the *Ius Gentium*, the very essence of which was (1) uniformity of law, and (2) philosophical ideas of justice underlying, or over-riding, the technical rules of positive Municipal Law. Our Private International Law consists of maxims to determine when, and under what conditions, the technical rules of one system of positive Municipal Law will be used to supplement, or correct, the technical rules of some other system of positive Municipal Law. In a word, the Roman law has nothing really analogous to this, because the Romans never accepted the modern notion of civilized nations forming a friendly society of equal independent sovereignties. Private International Law is essentially a product of our modern sense of the brotherhood of nations, a peaceful and mutually dependent *family* of peoples.

As such we shall see that it only began to show some traces of existence in the consolidation of the Feudal and

Catholic organization of Europe into separate states; and its first appearance as a system follows close on the rise of the doctrine of the balance of Power after the period of the Thirty Years' War, and close upon the great European treaties and settlements which succeed the Peace of Westphalia.

There can be no doubt that the first trace of a distinct conception of the rules we now call Private International Law is to be found in the famous chapter of Bartolus, a great Italian civilian of the middle of the fourteenth century. This Bartolo was a celebrated lawyer, born at Sasso Ferrato, in the territory of Ancona, in 1313, and he died in 1358, in his forty-sixth year. In this short life he succeeded in producing ten vast folio volumes on the Civil Law and allied topics. In the first title of the first book of the Code, on the Supreme Trinity and the Catholic faith, Bartolus found the words *cunctos populos*. His commentary and explanation of this phrase forms the chapter which is the origin of our Private International Law. It struck the keen eye of this 'lamp of law', 'this master of truth', as he was called, that *cunctos populos* meant something very different to his contemporaries and to Justinian: seeing that, in his own day, Europe was made up of many sovereign states, having local laws originating in Feudalism, to which they clung tenaciously, and so small and so much intermingled, that men were perpetually passing from one to the other.

In fact, modern Europe being based on the settlement of a crowd of conquering races—Goths, Burgundians, Franks, and Lombards, on the old Roman Empire—each of these retained in a measure their national law; and thence arose, according to strict feudal principles, the notion of personal law or personal statutes, in opposition to the territorial law. The general territorial law remained

the more or less modified civil law. The personal law was that which applied to the various mingled races amongst the subjects of each particular sovereign.

Now in this short chapter of Bartolus we have a sketch of the true questions of Private International Law, treated according to our modern canons. Thus, the first section distinguishes the formalities of a contract from its substantial effect, and places the former, as we do, under the law of the place where it is made. This is one of the great canons grounding all modern rules on the subject. The next section lays down another of our great canons—that the *lex fori* determines the course of *procedure* in every trial. Next, he treats of the rule of the *lex loci rei sitae*: then he treats of the law as to personal status, and therein of the general principle of *domicile*. Then comes the rule that in Private International Law, as distinguished from the Roman law, a testator may die partly testate, partly intestate. He then treats of laws extending personal capacity as having effect outside the territory, whilst those which limit personal capacity are confined to the territory where they are in force; next, the case whether the English rule of inheritance by primogeniture would be extended to real estate situate out of England. He next treats of the extra-territorial effect of penal statutes.

Now here we have, though meagrely enough, a real attempt to grapple with these questions in a scientific spirit. Bartolus seems to have been the first who hit on the true method of approaching them by analysing every complex case into its component parts. He did not say crudely, 'This case must be governed by this law, and this by the other'; but he accurately traced up the generating fact of the legal relations in its varying course, and placed each branch of the relation under its proper rule. Thus he was led to the foundation of all Private

International Law when he said, 'In a case of complicated legal relations the *procedure* to be followed in every court is that of the court which is trying it; then, in a case of contract we must distinguish the formalities on which it professes to be based, the place where the contract is to be executed, *lex loci solutionis*, the effects which may follow from it, matters which arise elsewhere subsequent to the contract, and the personal status of each contracting party. To each of these elements in the transaction its own appropriate local law must be applied.' Undoubtedly we have here the germs of our existing Private International Law.

Bartolus invented or systematized the famous grouping of laws into *laws personal* and *laws real*, by which it was attempted to classify laws that affected status and laws that affected things or immovables. Too much has been made by those who apparently never read him, of the famous verbal test of Bartolus to distinguish these laws. '*Bona veniant in primogenitum*', he said, was a real statute; '*primogenitus succedat*' was a personal statute. Thus, it was said, 'the law will depend on the princes' ideas of grammar.' This was no doubt ridiculous enough. But notwithstanding this quibble (so entirely in the spirit of the Mediaeval Logic), Bartolus's great distinction of Real and Personal Statutes remained the basis of the whole jurisprudence on this subject for three or four centuries.

It appears from this sketch of the meagre but distinct work of Bartolus, that what is so loosely called Private International Law is a great deal older than Public International Law, of which it is sometimes taken to be a branch. There was nothing that could be called International Law as a substantive scheme of rules until the consolidation of the European State-system in the sixteenth or even seventeenth century. But as early as the four-

teenth century, the conflict or intermingling of separate municipal laws had already been arranged as a definite body of precise, and even technical, rules familiar to the tribunals of Europe.

No step of any importance was taken down to the time of D'Argentré, a French judge of Brittany, who flourished in the second half of the sixteenth century, and whose works were published in 1608. Argentraeus (or D'Argentré) wrote in Latin. He did not treat Private International Law systematically, but, as he wrote on the local law of the duchy of Bretagne, he was incidentally led to consider the problem arising when the local customs of Brittany and the common law of France pointed to a different solution of the same case. The way in which he is brought to these questions was as follows. The custom of Bretagne requires that no one should leave away by testament more than one-third of his immovables. Ought immovables situated out of Bretagne to be included in this third? And if so, on what principle? This opens the entire question of Private International Law. The great contribution of D'Argentré to the terminology of the science was his adding to the *personal* and *real* statutes the class of *mixed*. These are statutes which concern at once persons and property. For a century and a half at least from the publication of D'Argentré's work the threefold division, not the twofold division, was adopted.

We may pause here to consider this famous tripartite division of statutes. *Statutes* were originally any rule of law, arising from custom, legislation, royal ordinance, or judicial decision, but not being a rule of the old Roman law or common law of Europe. Thence the term statute became applied to the whole municipal law of each state. Personal statutes, to take the definition of Merlin, were 'those which have principally for their object the person,

and treat only of property incidentally, such as those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract, to make a will, to plead in proper person, &c. Real statutes are those which have principally for their object property, and which do not speak of persons, except in relation to property; such as those which concern the disposition that one may make of his property, either while he is living or by testament. Mixed statutes are those which concern at once persons and property.' But he adds, 'In this sense almost all statutes are mixed, there being scarcely any law relative to persons which does not at the same time relate to things.'

This classification held its ground down to the end of the eighteenth century, and perhaps cannot yet be spoken of as perfectly exploded. But it is obvious to us, at least, who have been trained in the school of Bentham and Austin, that it meant nothing.

All laws, according to the analytical jurists, are commands addressed to persons to do or to abstain from doing certain things; and the notion that some classes of laws affect persons and other classes affect things is entirely unscientific. Take such a simple question as this—the age at which a person shall be treated as competent to make a valid disposition of his or her estate, according as the property is movable or immovable. Is this a law relating to persons or relating to things? It is obvious that subtlety is wasted in endeavouring to solve so idle a question. There is, moreover, another difficulty. How define what are personal statutes that do relate to persons, and what are real and relate to things? This difficulty has led to endless refinements and distinctions, one writer differing from his predecessor and laying down new tests of the distinction. As Savigny explains, the distinction of real, personal, and

mixed statutes contains some rough approximation to truth, and has an element of reality in it. For instance, the age at which a man or woman can contract a valid marriage may be fairly called a *personal* law, the mode in which land can be validly conveyed may be called a *real* law. There is in extreme cases this residuum of truth about the distinction. But for a general theory it is too vague and uncertain to be relied on, and the consequence is, that the different ways in which a succession of writers have explained the distinction have destroyed any utility in the theory.

The total want of scientific basis in the distinction itself, the idle and cumbrous subtleties to which it gave rise, and the impossibility of applying the distinction exactly to a variety of systems of law, seem to leave no alternative but that of finally discarding all remnants of the division of personal and real laws. It would be better to treat the terms solely as matter of history. It is a signal instance of the value of the English analysis of law, matured by Austin, that it at once clears up the inveterate confusion which for centuries embarrassed the most famous civilians. When we analyse a law into the command of a sovereign addressed to a person, commanding him to do, or to forbear from, some thing, we learn to treat *status*, acts, and things as elements which we can in the abstract detach from the complex parts of every concrete law, and so view them as separable elements of it for logical purposes. And thus we cease to refer one legal doctrine to status and another to things. A very simple rule of law, contained in one line—viz. that the contract of an infant is binding if ratified on his majority—mixes up matters of status, acts, and things in a way that can be analytically considered apart, but so that the rule of law in the concrete cannot be classified under one element more than another. The

attempt to refer all laws or rules of law absolutely to any one of these elements belongs to the very infancy of jurisprudence.

It follows from this that an immense portion of the literature on the Conflict of Laws has been based on a thoroughly unscientific theory; indeed, upon a theory which was a simple confusion of thought. The labyrinth of distinctions into which their notion of personal and real statutes involved them, seems to have led the older writers on the Conflict of Laws to distrust the very basis of their work, and to be perpetually seeking a new foundation. The civilians of the sixteenth, seventeenth, and eighteenth centuries were constantly exercised to discover some new reading of the old division. Hence, from the point of view of scientific theory, their labours are almost valueless to us. At the same time, their native acuteness and their practical sense enable them to lay down most useful dicta in a mass of special cases. It is well, however, to remember that from the point of view of rational theory their method was utterly vicious and idle. Private International Law requires cases to be broken up and analysed; and every attempt to group rules of law under one or two great classes was utterly useless for the purpose of this analysis. When we see the older writers, down to the beginning of this century, solemnly cited as authorities in such books as Story's, we must steadily bear in mind that, with all their good sense and practical judgement, they none of them had a really scientific conception of the subject.

The earliest attempts to found a theory of Private International Law had been made in Italy in the fourteenth century. The next great epoch was in Holland and Northern France in the seventeenth and eighteenth centuries. The Dutch civilians, who held fast, on the one

hand, to the old theory that *personal* statutes everywhere followed the person whom they affected, on the other hand were confronted with the fact that Dutch independence required the most rigorous assertion of the principle that the Sovereign is supreme within his own territory, and also with the fact that they found themselves surrounded with a mass of small communities having different local laws, and closely united in commercial intercourse. The Dutch jurists set themselves valiantly to adapt the problem of a supreme territorial law to the personal capacities and liabilities of a very migratory people. It was, in truth, a dilemma which far exceeded their utmost ingenuity.

Rodenburg, judge of the Court of Utrecht, was the earliest of these: he wrote, in 1653, *De Statutorum diversitate*. Paul Voet, also a Professor of Utrecht, wrote, in 1663, *De Statutis et eorum concursu*. John Voet, his son, in 1698, wrote *De Statutis*. Ulrich Huber wrote, in 1686, a short treatise, *De Conflictu Legum*; and Hertius, or Hert, a judge and professor at Giessen, wrote a short treatise in 1688, *De Collisione Legum*. We thus get a body of writers in Holland and North Germany during the second half of the seventeenth century, the age of Louis XIV, all treating of the classification of laws under the titles of *diversity*, or *conflict*, or *concursus*, or *collision of law*. The term *comity* (which occurs in the form *comiter* in the Digest) seems to have been first introduced by Paul Voet in 1663. The term in familiar use in modern law—*conflict of law*—seems to have been introduced (it certainly was popularized) by Huber, and dates from 1686.

But there is another ground on which Ulrich Huber stands out apart from all other civilians. All of these writers, full as they are of good sense, learning, and practical acumen, were entirely occupied with the old problem how to distinguish *personal* from *real statutes*;

how to find tests for such statutes as had validity outside the territory, and for those whose force was limited to it. This, as I have already argued, is a perfectly futile and unreal inquiry; but in Ulrich Huber, if he uses this basis, we have something more. The treatise of Huber, *De Conflictu Legum*, is simply a small essay in his Introduction to the Civil Law. It is all printed in five quarto pages. In the whole history of law there are probably no five pages which have been so often quoted, and possibly so much read. They are distinguished by clearness, practical judgement, and a total absence of pedantry. So far as they go, the maxims of these five pages are satisfactory and accurate. It is true they go a very little way, and are exceedingly general. But, at the same time, they cover the ground of Private International Law, and treat it according to our modern ideas.

During the seventeenth century Private International Law was in the hands of the Dutch; during the eighteenth it was in the hands of the French. But the latter added nothing to the general principles of the science. It is needless to do more than note the works of D'Aguesseau, Bouhier, Froland, and Boullenois, all of whom flourished in the first half of the eighteenth century, the great pre-Revolution era in France. They are all full of acute remarks on special cases, but they none of them succeeded in adding many scientific rules to the three famous canons of Huber, and they adhered to the old hopeless plan of trying to classify statutes, instead of analysing legal relations. By far the most important of all these was Boullenois. He translated and amplified the old treatise of Rodenburg, the earliest of the Dutch school, who wrote in 1653. Boullenois adhered closely to the strictest scheme of classifying statutes as real and personal, rejecting with Rodenburg the distinction of D'Argentré into the third.

kind, or *mixed*. He lays down forty-nine maxims of practical value, but without any scientific character; and he tries to build up minute sub-distinctions of laws as *laws personal and universal*; *laws personal and particular*; and *laws personal and particular purely*, and *laws personal and real*. All this is obviously useless pedantry. But, at the same time, Boullenois is still much cited. His vast learning, his careful style and profound patience, make his decisions in all concrete cases interesting and valuable. He is the Eldon of Private International Law. He died in 1762.

From this date to the close of the century—indeed, we may say down to the first quarter of the nineteenth century—we find hardly any writing at all on this subject. And this may serve to show us how intimately it was connected with political and social conditions. The latter half of the eighteenth century was occupied with the shock of the great French Revolution, and the military and political consequences of it; whilst the early years of the nineteenth century were engrossed in the great wars and the vast social and political changes which followed them. War had broken down the peaceful interchange of municipal laws—*inter arma silent leges*. The whole system of law in Prussia, in France, and in so many states of Europe, was transformed, and the new Codes, based on the Civil Code of France, made a new departure for the municipal law of Europe. Many of the sources of Private International Law, arising from local law, were swept away; many of its knotty points were solved by legislation or by treaty. And thus for the time it ceased to furnish the civilians of Europe with interesting problems.

What during all this time had been the position of England with regard to this science? It had been absolutely null. So far as I know, there does not exist, in the whole range of the English law library, a single

treatise, not an essay or a commentary, on this branch of law earlier than the nineteenth century. The Dutch civilians were scarcely known at all; the French were occasionally cited. Down to the middle of the eighteenth century in England I cannot find a single opinion or decision which seemed to show the consciousness on the part of English lawyers that there was any branch of law such as that we are now considering. In 1752, in *Scrimshire v. Scrimshire*, a very simple case of foreign marriage was treated as a case of *first impression*, not previously considered or decided. Our insular position, our complete detachment from the civil law, and our complete indifference to any systematic treatment of legal theory apart from cases of practice, explain the fact that down to the beginning of the nineteenth century Private International Law was absolutely unknown in this country.

From the close of the eighteenth century, and in the early part of the nineteenth century, a series of new causes began to operate. The great school of philosophical jurists which culminated in Savigny transformed the field of jurisprudence. After the appearance of his *System of Modern Roman Law* the whole scheme of legal ideas received a new foundation. But before this, other causes had been at work. The new codes and systems of law in Europe began to be compared with each other. New relations of intercourse between states were multiplied. And a far more fertile source of growth was at work. The States of America had each their own system of law, and they threw up a mass of problems, turning on the interchange of Municipal Law, precisely similar to those which the local law of the small communities of Holland and the provinces of old France had furnished to the Dutch and the French civilians of the seventeenth and eighteenth centuries. Each State in America had its law of marriage

and divorce, its bankruptcy law, its system of land law and security law. Louisiana had the civil law of France for its common law, and the Code of Napoleon for the type of its code. The Northern States had the English common law and English decisions. Here was an unlimited source for problems in the Conflict of Laws. To solve these problems, the great American lawyers and judges were thrown back upon the old Dutch and French civilians. The American decisions and dicta of the civilians were all collected rather than arranged in the vast and trackless wilderness, that encyclopaedia of learning, known to us as Story's *Conflict of Laws*.

This famous work was first published in 1834 (it has now reached the 8th edition, 1883); and from the date of its appearance hardly a single case on this subject in America or in England, and perhaps few on the Continent, have ever been decided without some reference to this learned book. A new era in the History of Private International Law may be traced from it. It was an immense storehouse of legal decisions on every topic. For the first time, the English and American judgements were placed side by side with extracts from the whole range of the civilians, from some fifty of whom the author gives us copious selections. It was at once manifest that this class of question could not be decided by exclusive reference to our own particular municipal system.

Story's *Conflict of Laws*, though in many ways the most important and possibly the most comprehensive that exists on this department of law, is in other respects one of the least scientific, and one of the least conclusive books in the entire library of the jurist. It is a vast repertory of opinions on every known topic from every accessible writer; and these heterogeneous opinions, based on a multitude of conflicting theories, drawn from writers extending over a period

of five centuries, and of value utterly different, are tossed together almost like the words in a dictionary, without any attempt to draw a conclusion from the balance of authority. To Story it seems sufficient that a jurist has made a remark; and whether the remark was made under the Feudal system of Europe in the fourteenth century, or by an American judge trained in the Anglo-American common law, it makes no difference. '*Ita scriptum est*', says Story, and he declines to make any attempt to weigh these various dicta. 'My object', says he, 'has not been to engage in any critical examination of the comparative merits or mistakes of the different commentators, but rather to gather from each what seemed most entitled to respect and confidence.' And undoubtedly he has succeeded in this rather uncritical object.

From the sketch of the various theories given above, it is clear that the vast learning and the ingenuity of these civilians have been expended on purposes which were really quite valueless, in order to answer such idle questions as the *reality* and *personality* of statutes and the like, and to explain the reason why the laws of one country should have validity in another. At any rate, the older jurists have to be read with the utmost caution, and weighed in the most critical balance, unless they are to mislead the modern lawyer. And the critical balance is what Story deliberately disclaims any right to apply.

At the same time, his great practical good sense, his vast experience as a judge, his industry and indefatigable patience, make his great work a really indispensable text-book. It is a kind of dictionary of all opinions and all topics, and there are few writers in any language or age to whom the student will not find ample reference, and from whom he will not find extracts and opinions. I do not wish to disparage on the whole a very useful and standard

work of reference. But a word of caution is needed that this famous work on the Conflict of Laws is indeed a conflict of opinions; it is, as it professes to be, a book of reference, and not a critical work of judgement and authority.

But whilst the States of America had been furnishing to Story and his fellow-countrymen a vast assemblage of difficulties to solve in the Conflict of Municipal Laws, an analogous movement has been at work in England from the beginning of the nineteenth century. The international relations of England with other states were enormously expanded by the entanglement of wars, alliances, conquests, resettlements, and colonization, that marked the earlier years of the nineteenth century. The maritime law took new and great proportions, and it threw up in Lord Stowell one of the most impressive judges that has ever co-operated in the development of English law. His stately and graceful judgements make Robinson's and Haggard's Reports almost a section out of English literature; and as he presided in the courts that dealt with maritime questions generally, and also with questions of marriage, divorce, legitimacy, and testamentary capacity (courts which alone of all the English tribunals based their decisions avowedly on the civil and canon law), an immense impulse was given to the study of these knots of international or intermunicipal jurisprudence, and the authority of the civilians who had treated them began to be habitually cited by one of our foremost judges, perhaps the one most generally known and read by the public.

What was done by Story in America had been in some measure previously done for England by Lord Stowell. That distinguished and accomplished lawyer was followed by a succession of eminent civilians, such as the late Dr. Lushington, Sir C. Cresswell, not to mention the other judges who have occupied his bench. The judgements of

these learned men nearly coincided with a remarkable series of decisions by the House of Lords on the conflicts that arose between Scotch and English law, chiefly on the subject of Marriage, Divorce, Legitimacy, and Succession.

Since the beginning of the nineteenth century another influence has increased the importance of this subject. The immense colonial empire which had been acquired or consolidated during the long wars at the close of the eighteenth and the opening of the nineteenth centuries, threw upon our tribunals the ultimate decision of a vast body of cases arising under multifarious systems of law. English judges were called on to determine cases under French law, Dutch law, Danish law, Spanish law, and all kinds of modifications of the civil law, in accordance with local practice or special legislation. Along with these cases came those under the Indian law, partly Hindoo, partly Mahommedan, partly of British enactment. And cases under any of the local systems, or under any colonial code, were correlated with, or conflicted with, English law. The migratory and adventurous habits of Englishmen and English traders, and the enormous development of British commerce and British settlements within the century, opened an almost inexhaustible field for these questions of intermixed jurisdiction. English tribunals, and especially the Privy Council, the ultimate tribunal of appeal for the whole colonial empire, have consequently had cast upon them a task such as perhaps never fell to the lot of any tribunal in ancient or modern times. It was nothing less than that of trying cases complicated by the rules of almost every system of law that obtains in any part of the habitable globe.

The result of this has been the formation of a vast body of jurisprudence, hardly any portion of which existed in the days of Lord Eldon. Forty years ago there was not

a single English work on this great department of law. We have now [1879] an entire literature on the subject in the works of Burge, Westlake, Wharton, Phillimore, Foote, and Dicey, not to speak of the remarkable series of judgments in the Privy Council, in the Court of Appeal, and in the Court of Probate and Divorce. A number of political causes—our vast commerce, heterogeneous empire, and our subdivision, even at home, into three kingdoms, each with a separate jurisdiction—have placed this country in the front rank of those which are concerned in these problems of the Conflict of Laws. The work has been done essentially in the English fashion, that is, by judges determining practical cases, not by jurists propounding doctrines. The English theoretical lawyers have been late in entering on the field already occupied abroad by some of the most illustrious names in the literature of law. But these are now filling up the void; and in this branch of learning at least our countrymen need feel no shame when they speak with their neighbours at the gate.

Our English conception of law, indeed, preserves us from the fantastic sophism which is current in parts of the Continent, that Private International Law can be created into a uniform system by the meditations of jurists, and imposed by virtue of its logical consistency on the various tribunals of Europe. Some of the more recent publicists of Germany and Switzerland, and even the great name of Savigny, have been invoked in support of this singular Utopia. At the annual congresses of International Law we hear much to the same effect. Indeed, there seems to be growing up a continental school (led chiefly by Italians) who dream of a universal Code of Private International Law; who would appear to look on these rules as having a claim antecedent to, and higher than, any municipal or national law whatever, and who think that they can be

placed on the same basis as International Law, as a kind of universal common law of the civilized world.

Englishmen, whose ideas of law are based on the theory of sovereignty which we derive from Hobbes, Bentham, and Austin, whose notions of jurisprudence are drawn from practical decisions, not from dogmatic theories, are not likely to be very sanguine about the prospects of a jurisprudence that professes to be independent of all positive legislation, paramount to the decisions of all tribunals, indifferent to local practice and habit, and almost superior to public convenience.

The English habit of extracting a general rule from a comparison of decided cases, and the enormous variety of the English relations with foreign codes, are no doubt influencing the foreign lawyers by leading them to extract rules of mutual convenience *a posteriori* from an examination of actual decisions, rather than to frame general dogmas *a priori* from logical deductions. Another important element in the future is the growing practice of international arrangement, by which some of the most knotty problems are being directly solved by public treaty between sovereign states. Everything points to this process as the most reasonable, as well as the most practicable, method by which the inevitable Conflict of Laws between civilized and equal communities may be brought within manageable shape. Nations, which are every year settling some case of international administration by official or diplomatic conferences, must ultimately learn to settle the more troublesome problems arising out of the diversity of their laws by the same process. But, in order that we may bear our part in this most desirable end, we need the formation of a school of lawyers specially conversant with this subject. Nor can it be any longer remarked by American and continental lawyers that England is the one country without such a school.

CHAPTER V

THE CONFLICT OF LAWS. II

[1879]

HAVING traced the development of Private International Law, we will proceed to consider the limits, sources, and definition of this branch of jurisprudence. The extreme diversity of names that have been applied to it points to a very remarkable elasticity in the way in which its function and field have been conceived. The Conflict, Concourse, Collision, Diversity, Contrariety of Laws have been adopted as terms as well as Private International Law, the Personality of Statutes, Mixed Questions, Limitations upon law arising from questions of *Place*, and many others.

Private International Law is in many ways a very unsatisfactory name. It suggests the wholly erroneous idea that it is a sub-department of International Law. International Law treats of the public relations of states; Private International Law of the decisions of local tribunals. International Law is one for the whole civilized world; it is a system of rules common, or supposed to be common, to the society of nations. Private International Law, on the other hand, takes into account a great diversity of practices on the same matters adopted by different friendly nations. There is very far from being any common code or common law. Private International Law is the *Conflict of Laws*. Public International Law is the *Concordance of Customs*. International Law has no reference to tribunals at all. Private International Law is solely concerned with the

practice of tribunals. International Law has no sanction in Austin's sense of the word; or its sanction is war, public opinion, or loss of national character. It is (in Austin's sense) not *law*. Private International Law has the same sanction that any other part of the Municipal Law has; and is, *stricto sensu*, *law*. Austin has pointed out the vagueness of the terms *private* and *public* law, the diversity of senses in which they have been used, and the fallacy of opposing private to public law. In the civil law sense, private law is civil law as opposed to *constitutional* law and to *criminal* law. Yet questions of criminal law—such as extradition, the applicability of the penal law, the arrest, trial, and punishment of persons not citizens of the state, or in respect of offences committed outside the country trying the prisoner—these are questions of public law, and yet they are usually included, and ought properly to be included, in Private International Law. The same may be said of questions of allegiance, naturalization, and expatriation. These are certainly questions of *public* law in whatever sense we use the word *Public* law; and yet they are usually included, and properly included, in Private International Law. Such questions are also very rightly and properly included in treatises on Public International Law. Hence result these anomalies:—(1) Private International Law is not International Law at all; (2) the term Private Law is always loose and unscientific; (3) Private International Law embraces large portions of what is certainly Public Law, and some things which are actually determined by Public International Treaty. The nomenclature in fact rests on a series of false analogies and cross divisions. Lastly, Private International Law is an exceedingly cumbrous and troublesome phrase.

There is a sense in which Private International Law has close relations with International Law. All questions of

citizenship, reciprocity of civil rights for the citizens of different states, extradition, criminal justice where offender or offence have been, or are, outside the territory of the *forum*—the entire question of *comity* or reciprocity—are all closely related to International Law. But the relation is not that of opposition or contrast. There is no possible bisection of the field between Public and Private International Law. We cannot contrast them as we do—Civil and Criminal Law. There is not one class of rights or legal relations within the field of Public, another class within the field of Private, International Law. They sometimes deal with the same class of legal relations, as in the case of extradition or expatriation, but they treat them from different points of view for different purposes. A Scotch divorce of an English marriage forms a typical example of Private International Law. What has that to do with International Law? The only quality of Public International Law it has, is in the relations of two communities under different Municipal Law and under one sovereign. That is to say, Public and Private International Law sometimes treat the same class of legal relations from totally different points of view; the one as it strikes governments and diplomatists, the other as it strikes judges and the officials of tribunals. Sometimes the two have no common field at all, and no point of contact, except in that both are concerned with relations, not between two states, but between two municipal systems. There might be, and in fact we may say there is, a complete system of Private International Law in the federal States of America *inter se*; just as there was in the seventeenth century, in Huber's time, in the Dutch communities, or as there was in the French provinces in the time of Bouhier, Boullenois, and Pothier. But there was but one national sovereignty for all of these communities taken as a group; and therefore

there can be, properly speaking, no international questions between them. Strictly speaking, if a man dies intestate holding real estate in several counties, part of which is gavelkind or borough English in tenure, the succession to his lands is determined by a set of considerations which are really Private International Law, though obviously there is nothing *international* about them.

On the other hand, the terms *Conflict of Laws*, *Collision*, *Contrariety* and the like, are equally unsatisfactory. It has often been pointed out that there is no conflict. The law of England adopts the law as to the forms of a marriage contracted in France, or as to the forms of a will made by an Englishman domiciled in France, not because English law is worsted in a conflict or collision with the French law, but because it is the law of England that the forms of the will shall be valid, when it is made in accordance with the law of the testator's domicile, or those of a marriage in accordance with the law where it is celebrated. There is no conflict and never was. This is simply the law of England. Where is there in English law any provision as to the way in which marriages shall be celebrated in France by French officials? There is no provision at all, and by the fundamental principles of International Law there can be none; and clearly there is nothing with which the rules as to French marriages established by French law can be brought into collision. The only question is—whether an English tribunal will try a cause having regard to these French rules. But what rule English judges will follow in trying a case before them is a pure question of English law. The real question here is, not whether French or English laws are to prevail, but whether this case is one to which the English law was ever intended to apply. If the judge finds that the English law has been extended to the case before him, he decides it so, and ends the matter, as in the case of

the Royal Marriage Act, or the case of marriage within the prohibited degrees. If he finds that the *prima facie* or apparent rule of English law does not cover it, then he ascertains what the English law directs to be done, and he may find that it directs him to go to some other set of rules.

This case is precisely the same as the case of local custom, or special practice. Suppose that a contract is being tried in an English court. In the course of trial it appears that the matter is properly referable to the custom of merchants or some local practice. The judge, who may now for the first time hear of the existence of the custom or practice, adopts the rule, and decides the case by it. There is here no conflict or collision of any kind. The common law of England is not overcome in the contest with the custom of the Exchange, or the practice of auctioneers. It simply defines certain cases in which it is open to proof that the legal relation of the parties is subject to, and the appropriate rule to which it must be referred is, the custom or practice. There is no more any conflict or collision here than there is in a case where it is held that the law relating to murder does not apply to a state of facts amounting to accidental homicide. Evidence shows that the rule of common law or the statute as to murder does not apply to a legal liability originating in the circumstances of the case under trial. Just so, the court finds that the forms imposed by the English Marriage Act do not apply to a legal status originating in a celebration by a French mayor. In neither case is there any conflict.

At the utmost there is not a *Conflict* of Laws, but ambiguity arising from the fact that more than one set of *co-ordinate* laws apparently apply to the case. The phrase of Savigny is strictly exact; Private International Law marks the limitation of legal rules in respect of *place*. Rules of law are intended to apply to states of fact in certain periods and

in certain localities. Private International Law determines the limits of place. But then this description of the subject does not point to the rule which does decide the case; it does not embrace the *mutuality*, or the interchangeability, of the law. In many ways the old French term, *mixed questions*, is a very good description. It points emphatically to a class that can only be determined by resorting to more than one system of law. The *Lex fori* always must establish a jurisdiction in some way, and in Private International Law it determines cases by reference to some other rules than its own. This combination of jurisdiction, this interchange of one law system with another, this reference to more than one law as applying to a case, is the essence of the idea.

There is a strong temptation to venture on the hazardous experiment of submitting a new term to describe this branch of law. Obviously objections may be made against attempts to give new names to old subjects. But in this case the terms in the field are confessed to be inadequate. There are a great many terms in constant use, very different in themselves, and all very defective. Private International Law is a cumbrous term; it is quite misleading, because it uses words in a non-natural sense, and words which bear a constantly shifting sense. The 'Conflict of Law' is a metaphor, and a very misleading metaphor. Now I take the leading fact that Private International Law is a substantive part of *Municipal Law*. I take the other leading feature, that it is really the interchange of *Municipal Law*; and I propose to name this branch of law *Intermunicipal Law*.

The advantages of this term I take to be these. *Intermunicipal Law* will be rightly contrasted with *International Law*. *International Law* will be the so-called law which has grown up to regulate the intercourse of states with each

other. Intermunicipal Law will be that part of Municipal Law which is determined by reference to more than one municipal system, that part of every municipal code which defines its relations to other municipal codes. Municipal Law is always contrasted with International Law as meaning the internal law administered by tribunals, not the customs observed by sovereigns or ministers *inter se*. And this is exactly the true character of Private International Law; it has nothing *national* or of public law about it. *Private International Law* is a confusion of terms, because *national* is equivalent to *public*, which is like saying private public law. Now municipal law is a correct term, whilst private is not; and, of course, it embraces *criminal* law, which, in the language of the civil law, *private* law does not. When one says *intermunicipal* law, one points to the fact that we are looking to the interchangeable part of Municipal Law, which is exactly the distinctive point of view. Lastly, Intermunicipal Law is a much less cumbrous phrase than Private International Law. It is certainly not more cumbrous than International Law, and quite as correctly formed. The one relates to the rules followed in the intercourse of *nations*, the other to the rules followed in the intercourse, as it were, of *tribunals*. I confidently recommend this new word, *Intermunicipal Law*, as at once accurate and convenient where inaccurate and inconvenient terms are in use, unless, indeed, any man prefers the precise terms, Interforensic or Interjural Law.

Let us now attempt to define Private International Law, that is, *Intermunicipal Law*, and to determine its exact field.

The exact description of it is as follows: *The law of compound jurisdiction*. It is at once a rule of all Public Law, of International Law, and of every municipal system, that each sovereign state has exclusive jurisdiction over all

persons, acts, and things within its local limits, and consequently over all causes arising within those limits. So far the basis of Private International Law rests on a general principle of Public International Law—viz. the exclusive territorial sovereignty of states. But as sovereign states have common dealings which lead to international relations, rights, and duties towards each other, so the individual citizens of sovereign states have common dealings which lead to intermunicipal relations, rights, and duties towards each other. To a certain degree the persons, acts, and things within one territorial jurisdiction are related to, or connected with, a like series of persons, acts, or things in another territorial jurisdiction. A complicated series of facts, or acts, leads to what, in Savigny's language, may be called a legal relation between two persons, or between a person and a thing. But it may happen that in this series of facts, or acts, there are found some which arise, or are found, within some other territorial jurisdiction. What in this case is the local law or local court to do? Is it to treat these external acts and facts strictly by its own rules? In that case it will be violating its own first principles in extending its rules beyond its own territorial jurisdiction. Is it to treat these acts and facts as null and void? This will work practical injustice, not only to foreign citizens but also to its own. Now so far Public Law, i.e. International Law, goes. It is an axiom of International Law that no state can refuse all rights to foreigners within its jurisdiction, nor can it treat with injustice or simply ignore their rights and legal position. No state can treat foreigners as *outlaws*, or decline to recognize all rights of theirs founded on facts or acts passing out of territorial limits. To do so would be a ground for reprisals, international redress, and ultimately war. Thus International Law forces states to take *some* recognition of legal relations arising out of facts

and acts beyond the territory. And it is thus, as it were, the parent of Private International Law.

There, however, it stops. It does not in any way determine *how* or by what system Municipal Law shall recognize these extra-territorial facts. It is accustomed to say that it leaves that to *comity*. So long as the Municipal Law of a country is not palpably unfair, or wantonly blind in dealing with persons or rights which are only temporarily or partially within its local jurisdiction, Public Law has nothing to say. Accordingly, Intermunicipal Law is in no sense a part of or a deduction from International Law. The utmost we can say is that International Law requires that there shall be *some* Intermunicipal Law. There are large sections of Intermunicipal Law, such as those relating to Criminal Law, Allegiance, Expatriation, all sections (and they are increasing) relating to treaties, which are closely associated with International Law: and accordingly justify the practice of writers such as Wheaton, Phillimore, Halleck, and others, who devote a substantive part of their works on International Law to the consideration of Intermunicipal Law.

But, strictly speaking, Intermunicipal Law is a substantive part of Municipal Law. Take a simple test. An estate is being distributed by the court under the terms of a will of A. B. in ordinary course. By the will a bequest is made to a child of C. D. It is found that the alleged child of C. D. was born and is living in France, where it is legally the child of C. D., testing the facts of its birth and parentage by the rules of French Law. Testing the same facts by the rules of English Law it is not a lawful child of C. D. The question arises as to which class of rules are properly applicable to this state of facts. The determination of this question is, of course, tried by the same judge in exactly the same way, and in the course of the administration as an ordinary part of the case, the rules of French Law

being proved in evidence just like the facts of birth, &c. The trial, judgement, and execution of the whole case forms one single, homogeneous act of jurisdiction, and the point of Intermunicipal Law arising in the midst of it is a mere incidental matter of inquiry, like the admissibility of a document, or whether the terms of the bequest apply to real or personal estate. Here is a characteristic question of Intermunicipal Law; and it is found to be triable exclusively by the Municipal Law of this country, which treats the foreign law as a fact determining certain other facts.

Hence we may get as our definition this: Intermunicipal Law is that portion of every system of Municipal Law which determines the conditions on which it will found legal relations on the rules of some other system of Municipal Law. We cannot say that Intermunicipal Law is a system of rules common to all systems of Municipal Law, because it does not form a single set of rules acknowledged by all civilized nations at all. The rules, for instance, as to divorce of a marriage contracted within their own territory differ extremely in European and American states, and there is no prospect whatever of their being assimilated in any reasonable future. Nor would it serve to say that Intermunicipal Law is that portion of every system of Municipal Law which is borrowed from the law of any other system of Municipal Law. For instance, when the law of England recognizes the marriage of English persons in Scotland without ceremony by any priest or registrar, provided such marriage be valid by the law of Scotland, the law of England does not adopt or borrow the marriage law of Scotland and incorporate it as part of its system, either permanently or temporarily. What takes place is this. The law of England, subject to definite exceptions, recognizes as valid any marriage celebrated according to the form lawful in the place

of celebration. But this is a rule not of Scotch law, but of English law. It is not even a rule of Private International Law, for the French Code has an analogous rule somewhat different in form. Nor could any general rule be stated on the subject, such as would apply to all civilized states.

There is no real conflict between the English and the Foreign law. The English *corpus iuris* (so to speak) contains rules as to the *conditions* on which rules of Foreign Law may be read with, and correlated with its own. But the rules of other systems do not become part of our own *corpus iuris*. Neither do the rules of any general system of Private International Law outside our own law.

The jurists of earlier ages abroad have been greatly exercised as to the *authority* for these rules of Intermunicipal Law, i.e. as to what it was that made them binding on the municipal tribunals and the citizens of a state at home. It has for ages been a hopeless dilemma to them, one on which they have exhausted vast learning and ingenious labours. Indeed, the continental jurists have ever struggled, and struggled in vain, to find some *authority* for the law which they administered or obeyed. Englishmen have had no such difficulty. As a nation we have for centuries been perfectly content to rest on the fact that the Common Law or Equity as interpreted by the judges, or the Statute Law as passed by Parliament, was in itself binding. If the Lord Chancellor or the Lord Chief Justice had ever been asked in the seventeenth or eighteenth centuries *why* the law was binding, he would have treated it, perhaps, as contempt of court, or would have answered, like a famous Speaker, who was pressed on a point of order, 'God in heaven only knows!' In any case Englishmen, whether lawyers or laymen, officials or simple citizens, never asked farther than *what was* the law. If any man had asked

why was the law law, they would only answer *because it was*—the judge said so, or Parliament so enacted it. Theoretically, the readers of Hobbes, Bentham, and Austin simply started with the *Sovereign* as the source of law, above all law, and outside all law. But this practical or theoretical acceptance of law *as law*, apart from any sanction for itself, has always been regarded on the Continent as something terribly low and degrading. They said that this is reducing law from what *ought to be* to what *is*, and is making it a matter not of right but of practical convenience. At this reproach we can only wonder and smile. I suppose Gaius, if asked *why* the *ius honorarium* was law, would only have answered that the Praetor for some ages had always so enforced it; or that the Emperor had given it judicial sanction by implied adoption emanating from his supreme authority. That is very much the position of our own law, so far as it is not embodied in statutes.

I imagine that in the whole history of Jurisprudence there is no more interesting problem than this—What has led to the great difference between the way in which Englishmen and English lawyers look at the *authority* of law, and that in which all continental jurists look at it? Abroad, the first question is, not what is the rule of law, but whence does the rule of law derive its binding authority? A foreign jurist is never satisfied to deduce a clear and cogent principle from a series of dicta, or decisions, or doctrines. He is never easy till he can get back to some ultimate reason which seems to him to make it a primitive act of duty in all men to submit to the rule. Just as Grotius labours to show that the practice of civilized warfare is consistent with Scripture, the classical historians, or the most distinguished moralists and philosophers, and is not content to rest the practice on the manifest convenience of nations and the progress of

civilization, just so in Private International Law the continental jurists are never satisfied until they can discover some paramount right which seems to impose on all tribunals and judges the duty to decide by this or that principle.

I believe the ultimate ground of this difference is this, that whilst in foreign countries governed by the civil law and the ideas deduced from it, the elaboration of legal doctrines is detached from the executive force which compels them to be obeyed, in England the elaboration of legal doctrines is almost exclusively and uniformly annexed to the executive force. That is to say, in England the *judges* develop the law in the very act of giving it effect under the process of the court. Elsewhere unofficial jurists develop the law, and they call upon *judges* to recognize and follow their dicta. Naturally the judges, feeling themselves the representatives of the sovereign, ask for some *authority*, such as can claim their acceptance of the doctrine of jurists. The jurists, on their part, have no authority from the sovereign at all, and for want of it they are driven to all sorts of expedients to devise some moral authority to compensate them for their total absence of *official* authority. Hence a continental jurist is perpetually troubled with the question, What gives this doctrine any *binding* authority? In Austin's language, What is its *sanction*?

Now in England, the real jurists are, and for five centuries have been, the superior judges, having a direct and visible authority from the sovereign, being in fact the mouthpiece, organs, and representatives of the monarchy. The judge's order is the King's writ; the Court is the Court of King's Bench; the trial is (in theory) heard by the Sovereign sitting in Westminster. 'Our Sovereign Lord the King' is everywhere present in every part of the trial, and the keeper of the King's conscience, or his

deputies, decide a matter in equity. If the greatest literary jurist be cited to one of the judges in support of an argument, the judge will probably ask if there be any authority for that proposition: meaning—is there any *official sanction* for the doctrine?

This is tantamount to saying, that in England *juristic* authority and *official* authority are in one and the same hands, and are exercised in one and the same act, viz. the judgement pronounced by a competent tribunal. The *iuris periti* here, to use Roman language, are clothed with full *imperium*. Elsewhere those who have the *imperium* are not in the highest sense those *quibus permissum est ius condere*: they are not at all the most authoritative of the *iuris periti*.

It is notorious and undeniable that the judges, under the continental system, do not hold anything like the high position that has been held for centuries by the historic magistracy of our country. The continental theory of arbitrary government has required a greater docility, and withheld that independence which is so characteristic of our own system. Here the highest aim of a jurist is the magistracy; elsewhere the magistracy is recognized as an inferior position. I remember a young and promising lawyer of Prussia telling me that he was doing so well in his profession, that, 'being now a judge, he was in hopes, in a few years, of being promoted to the bar'. The salaries of the continental judges rarely approach the fees of any advocate with a good practice. The great jurists are very rarely judges; but are almost invariably professors, advocates, or writers. In short, the position of inferiority to which a dependent condition, a close corporation, and small salaries have reduced foreign judges have reacted in such a way as to prevent their becoming the true intellectual sources of the law, so as to be its exponents and developers.

The result has been that everywhere, under this system, the *scientific* authority of the law is divorced from its *official* authority. The official judges, who can compel obedience to their decrees, have not the *scientific* authority which compels an intellectual assent to their arguments. On the other hand, those who have the scientific weight on their side to support their doctrines, have no executive force which can compel submission to them. In the absence of this executive force they are compelled to invent reasons for their rulings which may seem to command paramount obedience.

From this state of things—a state of things in which endless ingenuity is exhausted in the search for authority—we are saved by our political and social system, which makes the authoritative declarations of the law by an English judge at once an expression of the best juristic intelligence and learning, and also the decree of a Government official armed with the Sword of the State. An Englishman takes without question the judgement of the court as being not only the true view of the law, but also the order of a magistrate who will lock him up if he disobeys.

In searching for the authority for Intermunicipal Law the dilemma was this. As the notion of exclusive territorial sovereignty and national independence grew more distinct (and this was the foundation of International Law and of the European State system, and the gospel of the jurists), the idea grew more fixed that no court of law could admit any derogation of their territorial jurisdiction by accepting foreign law. But then came the dilemma. Courts of law of all states were continually finding within their local jurisdictions, appealing to their jurisdiction, or brought before it, persons whose general legal relations must be referred to other local jurisdictions inasmuch as they owed allegiance to some other sovereign, or usually resided

within those limits. A plaintiff or a defendant in court was alleged to have a wife. Was the woman his wife? The marriage had taken place years ago in another country, whilst the pair were settled within another local jurisdiction, and were living under forms not known to the court trying the case. To refuse to look into any rules but its own was to work manifest and flagrant injustice—an injustice that would end in reprisals and international difficulties. The courts accordingly tried the fact of marriage by the rules of the foreign state. By what authority did these rules of a foreign state operate out of its jurisdiction?

This exercised the great jurists continually, especially the Dutch jurists of the seventeenth century. It led to the invention of the theory of *Comity*, or consideration and courtesy as between nations. Vehement battles have been fought as to whether Intermunicipal Law really rested on *comity* or not. Some contended that since each sovereign state had exclusive jurisdiction within its own territories, foreign law could only be admitted by *courtesy*. Others replied by the equally cogent rejoinder that municipal courts decided cases by positive law, not by any sense of international courtesy, and that the recognition of these rules was not a matter of favour or option, but of right and of settled Municipal Law, and hence that comity was not an adequate foundation for Intermunicipal Law. It is clear that we have nothing to do with this barren and interminable controversy.

It rested, we can now see, on a confusion of two distinct ideas. From the point of view of sovereign state independence, i.e. of International Law, states might very fairly proclaim that if they admitted foreign laws at all, it was not because the foreign state had any jurisdiction within their borders, or right to claim it, but simply out

of grace and consideration. But from the point of view of the municipal lawyer, for the ordinary jurist, the conditions under which foreign rules of law are admissible to establish legal relations in the courts of his own country, were entirely matters within the four corners of his own *corpus iuris*. These rested, not on *comity* at all; they rested on the same authority, and were established by the same sovereign authority, and with the same view to public convenience as any other part of the law. Therefore, to the ordinary jurist, this talk about *comity* is idle and beside his purpose. In International Law it is a rational explanation of an apparent anomaly. But in Intermunicipal Law it tells us nothing, and only suggests an erroneous notion. It is preposterous to offer it as a basis for Intermunicipal Law, which rests on the same basis as the rest of the law—the will of the sovereign with a view to public convenience.

The continental jurists of this century do not talk so much about *comity*, but they have a still more interminable puzzle which exercises their ingenuity. It is this. What are the juristic theories from which this Intermunicipal Law can be deduced? And they have sought to establish a few plain canons as a basis for the whole range of Intermunicipal Law. A succession of great jurists have sought to lay down general tests to mark the conditions where one municipal system will be right in resorting to another system, and for what purposes. It is a long and most difficult discussion. Ingenious as these theories are, they are all confessedly defective. They have done much to clear up the ground in this very difficult problem of public law; they have done little to make the rules of Intermunicipal Law more available in practice. Where Savigny has confessedly failed we may acquiesce in the belief that the attempt, if decidedly heroic, has not got

the conditions of success. The discussion has been almost exclusively German and Italian. The English and American lawyers, as was natural, have hardly noticed it. The French, and now the recent Germans, incline towards our more practical view. We do not seek for higher generalizations from which the rules of law can be deduced. We content ourselves with classifying and stating the rules of law as they are developed in practice.

What is the source of this error? It flows, I think we must admit, from the continental habit of assuming that there is some substantive body of truth known as *right* or justice, antecedent to the positive law, and to which positive law has to conform. Accordingly there is a continual tendency to treat positive law as capable of being deductively found from principles of this *right*. In England and in America people are entirely free from the temptation to get any *deductive* knowledge of law. We think it idle and practically impossible for a theorist to declare *a priori* any general principle which will be found in practice to secure the greatest amount of public convenience under infinitely varying circumstances and combinations of legal relation and fact. Our historical plan has been to leave it to the instinctive sagacity of a trained judge to strike out the most consistent doctrine he could, *pro re nata*, by the analogy of the doctrines in other cases with which he has been long saturated. And then, having a multitude of these doctrines before us, all pronounced in actual cases of great variety, our scientific lawyer tries to generalize them and cast them in a more abstract form, so that for the future the doctrine may have greater distinctness and accuracy of limit, and the judge hereafter may gradually get rid of inconsistent decisions.

Why, in the department of Intermunicipal Law, are we to seek for a deductive method which we never think of

applying in our ordinary municipal system? Intermunicipal questions are simply part of every municipal system, tried in the same courts, by the same judges, under the same practice; and there is no reason why we should put on a totally different basis the law, we may say, which is to decide the validity of a marriage celebrated in France and that of a marriage celebrated in England. The doctrines applicable to the latter have been established partly by a long course of practical experience as conducing to the public welfare, partly by positive decision of sovereign authority. Why should the doctrines applicable to the former (or the French marriage) be established by deduction from a general abstract rule?

It would follow, if these trains of argument are sound, (1) that there is really no ground at all for the attempt to form one common body of rules for the civilized world in Intermunicipal Law, such as there has been formed for the public intercourse of states in International Law; (2) that it is chimerical to found any science of Intermunicipal Law by *deductive* reasoning from a few canons of an abstract kind.

To speak of each of these in turn:—

(1) The law of a nation is the result of a vast congeries of political, social, and intellectual forces; it is the product of its history, and is closely inwoven in its national character. Accordingly the law of civilized nations does differ, and will continue to differ, in many important features. But, if these questions of mixed law, or Intermunicipal Law, are still part of the Municipal Law, it is idle to expect that they can have the same solution for all nations. It might be a good thing (if it were not a Utopian fancy) that succession to property on death should be governed by the same rules in every state of the civilized world. But since succession is actually governed by very widely different

rules, it is superfluous to ask that it should be governed by the same rules in cases where the title to succeed may depend on some legal relation arising outside the jurisdiction of the state that tries the question. It may suit the history, genius, and legal theories of one state to admit succession under conditions which another state would judge quite inadmissible. And it would be as irrational to expect states to conform themselves to a common standard in these incidental cases of compound jurisdiction, as it would be to call on them to accept a common law of succession.

Accordingly, we cannot advance far on the path advocated by many continental schools, which treat Intermunicipal Law as a distinct international science, almost as if it were antecedent to, or independent of, Municipal Law. There are German and Italian writers who seem to think that this science can be evolved *a priori* by reasoning from principles of jurisprudence or from a lofty moral sense of right and equity. This is part of the price which a system of jurisprudence pays for the privilege of giving jurists the precedence over judges. It is now, I think, little less than a misfortune that Intermunicipal Law is still popularly supposed to be a branch of International Law. It is, in fact, much older in date, for Bartolus and Argentreus laid down the lines of it long before International Law sprang full-blown, like a new Athene, from the brain of Hugo Grotius in 1625. The connexion, which is not historically great (for Intermunicipal Law has been almost exclusively created by judges), has stimulated erroneous ways of treating Intermunicipal Law as if it were in some sort a *Ius Gentium*, or common law of the civilized world, and as such stood on a footing of authority and rationality apart from the practice and decisions of courts, apart from the positive law embodied in codes and

statutes, and apart from the idiosyncrasies and varying practical needs of different nations.

(2) With regard to the second point, it is clear, I think, that the only solid mode of promoting this branch of law is to found it upon the actual practice and decisions of different states, and to look to the comparison and gradual systematization of current rules, to positive laws and practical convenience, rather than to deduction from speculations, however profound. To pursue laws by the methods appropriate to morals and general philosophy is indeed a singular fallacy. The moralist or the philosopher has only to arrive at the truest analysis of man's moral nature or the most abstract canons of human thought. But in law, as in politics generally, it would be perfectly idle to lay down the best and loftiest principles of justice or social convenience, if societies of men are not found in practice conforming to these rules. A jurist might reduce to system the judicial practice of the King of Dahomey or of Zululand; and there was no doubt a kind of Intermunicipal Law recognized amongst tribes of Red Indians. For these reasons, I think that Intermunicipal Law must always keep close to Positive Law, of which it is in fact part; and in many ways it is best studied and promoted from the point of view not of general and abstract jurisprudence, but of some particular municipal system. Intermunicipal Law has owed much more to judges than to professors. D'Argentré, D'Aguesseau, Bouhier, Boullenois, Huber, Rodenburg, Savigny, Story, Phillimore, were all practitioners and judges. In many modern nations formal rules for Intermunicipal cases are now being inserted in their codes or their statute books. These are of course quite different, and yet they have the highest and most permanent character of Positive Law. There is not the slightest reason to suppose that these will be revised. But whilst they stand, Intermuni-

cial Law can only accept their divergencies and register them.

But, on the other hand, is it right to infer from all this that Intermunicipal questions cannot be studied at all in a general way, and that all we can do is to learn the practice of each particular system? Far from it. On the contrary, although there was neither international nor moral obligation to compel them so to do, civilized nations have as a fact very largely followed common principles and an identical practice. In a department of law which so largely depended on mutuality, or reciprocal recognition of each other's rights, they have naturally adopted to a great extent common rules. The authors who have written systematically on this very difficult branch of law have been few, and they naturally wrote to a great extent from a general point of view. Apart from this, ordinary motives of convenience and experience, practical judgements have, as a fact, led to a very large amount of actual agreement. The same set of authorities and the same authors have been appealed to for one or two centuries in the civil courts of the whole civilized world, and the consequence has been that whilst judges stubbornly refused to have any common or binding law thrust on them, they have in fact worked out a striking degree of practical unanimity. Although it has been proved perfectly idle to *deduce* a binding Intermunicipal Law from abstract principles of jurisprudence, these rules have proved of the highest value in giving meaning to and in reconciling the recorded decisions of local courts. Now no intermunicipal rules whatever, much less any set of such rules, stand *merely* as a part of the ordinary Municipal Law. No case is ever decided, even in English courts, much less in any other municipal courts, entirely without reference to the classics of Intermunicipal Law. The weight of this body of doctrine is so permanent that even if a case be

accidentally decided by a local judge ignoring entirely the general Intermunicipal Law, the case speedily loses any authority and drops out of sight. On this account not even the ruling of purely English tribunals can be understood or turned to account without a thorough study of the general theory of Intermunicipal Law.

I am very far from wishing to disparage the careful reading of the great theoretical jurists in this complicated subject. They are indispensable to the student, the practitioner, and the judge. If it be true that the principles of this branch of law cannot possibly be reduced to a few general doctrines, still no order will ever be achieved in the mass of conflicting decisions and practices except by the light of these general doctrines and consistent theory. With Intermunicipal Law as with the whole body of Municipal Law it is impossible to *begin* by forming deductively a symmetrical code; but *without* a symmetrical conception of doctrines, it will be impossible to arrange the decisions in a final code. Theory cannot precede Law; but without theory law would ever remain a chaos, having neither fixity nor authority. If it be, as I think, idle to dream of an Intermunicipal Code common to all civilized nations, even such an one as we might fairly anticipate for International Law, still the tendency of municipal systems to converge on this ground common to them all is very largely seen as a fact, and may be indefinitely increased. No one can study the anomalies produced even by the different rules of marriage in England and Scotland, the different rules as to legitimacy in England and in France, without desiring some mode of terminating so disastrous an incongruity. Complete unanimity is perhaps not desirable, and is certainly impracticable. Sufficient unanimity to avoid wanton inconvenience is most essential. And it is only by a careful study of theory that any unanimity at

all can be hoped for. Theory will never itself establish a uniform practice; but *without* theory a uniform practice is entirely impossible. Every one knows the extreme inconveniences that are caused by the decision of an English or an American court in complete ignorance of, or in defiance of, the common practice of civilized nations and the general doctrines of the theoretic jurists. One such decision destroys the labour of generations, and adjourns indefinitely the day when any rule can be evolved out of discordant practices.

But as in England and in America it is certain that courts will often decide on technical grounds of purely Municipal law, in defiance both of theoretic jurisprudence and the practice of their neighbours, and since on the Continent the theories are still divergent on many first principles, it is clear we must look for some solution of the ambiguities and difficulties to some stronger power. Such a power, I believe, can only be found in direct Legislative authority, direct International agreement, and ultimately in Treaties between States. Great progress towards a direct agreement has already been made, and to that only can we look in the future. But that agreement will be fruitful and beneficial only as it is based on sound theory and scientific analysis of the common axioms of law.

[First publication in 1879. Second publication in 1919.—
F. H.]

ANNOTATION I

AUSTIN AND MAINE ON SOVEREIGNTY¹

LAW AND SOVEREIGNTY

THE text, supplementing the famous lectures of Sir Henry Maine in his *Early History of Institutions*, on 'Sovereignty' and 'Sovereignty and Empire', explains with a lucidity with which, so far as I am aware, it has not been explained elsewhere, the true value, aspect, and intent, of Austin's analysis of sovereignty and law. That analysis Mr. Harrison shows may be summed up in the following two short propositions:

I. The source of all positive law is the definite sovereign authority which exists in every independent political community and therein exercises *de facto* the supreme power, being itself unlimited, as a matter of fact, by any limits of positive law.

II. Law is a command relating to the general conduct of the subjects, to which command such sovereign authority has given legal obligation by annexing a sanction or penalty, in case of neglect.

'Now,' says Mr. Harrison (*supra*, p. 24), 'these propositions are in themselves perfectly simple and almost obvious. They follow from the careful statement of the terms employed: and are only not truisms because they have been so very confusedly conceived in other authors.'

'What, then,' the student may very reasonably ask, 'is there

¹ In the annotations to this book my object has not been so much to add myself to the numerous commentators on the subjects with which they deal, as to set out in logical sequence what have appeared to me the more striking thoughts contributed upon them by subsequent writers, and, in that way, add, in some measure, to the value of this volume as a text-book in Law Schools and Universities. The Lectures on Jurisprudence were delivered and printed anterior to the works cited in these Annotations.

to trouble about?' On two of the points, on which the 'trouble' arises, I purpose to add something to what is stated in the text:

(1) Austin speaks as though in every political society there necessarily exists a determinate sovereign body or person. Is this, in fact, the case?

(2) Austin speaks as though the only rules which can properly be called 'law' are *commands* of this sovereign body or person in the State. Is this, in fact, the case?

Now on the first of the above questions I shall say very little. It is well, however, to point out the distinction that is drawn between a 'People' and a 'State' or 'Nation', in the English use of the word 'Nation' as equivalent to 'State'.

For that I borrow from what Sir T. Erskine Holland says in his *Jurisprudence* (12th ed., p. 46):

'A "People" is a large number of human beings, united together by a common language, and by similar customs and opinions, resulting usually from common ancestry, religion, and historical circumstances. A "State" is a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority, or of an ascertainable class of persons, is by the strength of such majority, or class, made to prevail against any of their number who oppose it. A State may be coextensive with one People, as is now the case in France, or may embrace several, as was the case with Austria. One People may enter into the composition of several States, as do the Poles and the Jews. A People, it is truly said, is a natural unit, as contrasted with a State which is an artificial unit.'

Then in Bluntschli's *Theory of the State* (pp. 86-7) we read:

'The conception of a "people" may be thus defined. It is a union of masses of men of different occupations and social strata in a hereditary society of common spirit, feeling, and race, bound together, especially by language and customs, in a common civilization, which gives them a sense of unity and distinction from all foreigners, quite apart from the bond of the State. . . . By a "Nation" we generally understand a society of all the members of a "State" as united and organized in the State. The Nation comes into being with the creation of the State. It is the consciousness more or less developed of political

connection and unity which lifts the Nation above the People. . . . A Nation is a collective personality, legal and political.'

Now is there, as a matter of fact, in every such State or Nation, a determinate body or person which possesses sovereignty, or, in other words, absolute ruling power over the inhabitants and affairs of that State?

I will cite the words of Sir Frederick Pollock, in his *First Book of Jurisprudence* (pp. 258-61):

'Although the whole theory of Sovereignty is modern, and, in fact, could not have been definitely held or expressed before the principal States of modern Europe had acquired a strong and consolidated government, writers on the philosophy of law and politics have readily fallen into the way of assuming that civilized government cannot exist, or can exist only in an imperfect manner unless there is some definite body in the State to which sovereignty can be attributed. . . . In our own time, if we extend our view eastward to Bern, or as far west as Washington or Ottawa, we may find reason to think that Blackstone laid down the supposed necessity of an absolute uncontrolled authority in terms altogether too peremptory and universal. . . . Where there is a *rigid* Constitution, to use the convenient term introduced by Mr. Bryce and Mr. Dicey, there cannot be any one body in permanent existence or habitual activity which possesses unlimited sovereignty. The nearest approach to Parliamentary sovereignty as we have it in England must be sought, in every such case, wherever the ultimate power of altering the written Constitution is placed by the Constitution itself. In the United States, for example, this amending power is exercisable only with the consent of three-fourth of the States expressed either by their legislatures or in special conventions, and moreover, no State can be deprived of its equal suffrage in the Senate without its own consent. The English doctrine of absolute sovereignty is not capable of being usefully applied to Constitutions of this type. In fact it is a generalisation from the "Omnipotence" of the British Parliament, an attribute which has been the offspring of our peculiar history and may quite possibly suffer some considerable change within times not far distant.'

And so Lord Bryce says:

'In a country governed by a Rigid Constitution which limits the power of the legislature to certain subjects, or forbids it to transgress certain fundamental doctrines, the Sovereignty of the

legislature is to that extent restricted. . . . In such a country legal Sovereignty is divided between two authorities, one (the Legislature) in constant, the other only in occasional action.' (*Studies in History and Jurisprudence*, vol. ii, p. 53.)

And again :

'It is further to be noted that the totality of possible legal sovereignty may, in a given State, not be vested either in one sovereign or in all the sovereign bodies and persons taken together. In other words, there may be some things which by the constitution of the State no authority is competent to do, because those things have been placed altogether out of the reach of legislation. . . . There is thus in the United States no authority invested with legal power, in time of peace, to prohibit public meetings not threatening public order, or to suppress a newspaper. It is true that the people of each State (or of the Union) retain the power to alter their Constitution, but until or unless they do alter it the acting legal Sovereign remains debarred from an important part of the power of Sovereignty.' (*Ibid.*, p. 58.)

But as the text points out (*supra*, p. 29), 'though there may be as matter of history, politics, or political philosophy, no determinate sovereign, there are no limits to the absolute power of the sovereign within the range of municipal law : or, in other words, to the lawyers there are none. And to the lawyer there is always a determinate sovereign', namely, the immediate maker of the rule of law, or, if not the immediate maker, yet the power which, through the Courts, will enforce the rule of law.

Professor W. Jethro Brown in his *Austinian Theory of Law* says :

'It seems probable that the Jurisprudence of a near future will recognize that the State itself is the true Sovereign, and that such a body as the Parliament of Great Britain should be described, not as the sovereign, but as the sovereign organ' (p. 286).

We can now proceed to our second question propounded above (*supra*, p. 149). Can we in accordance with history and with fact properly say that the only laws strictly and properly so called are *commands* of the sovereign body or person in the State? Or, omitting the word 'command', can we accept without

demur the modification of language suggested by Sir T. Erskine Holland, that :

‘A law, in the proper sense of the term, is a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities is that which is paramount in a political society.’ (*Elements of Jurisprudence*, 12th ed., p. 41.)

Can we rest quite content with the assertion that all law, properly so called, is enforced by a sovereign political authority?

To begin with, as Professor E. C. Clark in his *Practical Jurisprudence*, at p. 165, says :

‘There are some rules, of extreme importance, obtaining in every State, bearing upon the personality and powers of the sovereign’s self, which are neither set nor administered by that sovereign, to which Austin, therefore, denies the name of *law*, but which are generally and reasonably known by that name.’

Then again, as the text shows (*supra*, pp. 41–6), there are many rules of law which can only in a very circuitous and indirect way be said to be ‘commands’ at all. But Professor Holland points out that :

‘Such cases will cease to be anomalous if we recognize that every law is a proposition announcing the will of the State, and implying, if not expressing, that the State will give effect only to acts which are in accordance with its will, so announced, while it will punish, or at least visit with nullity, any acts of a contrary character. The State thus makes known what advantages it will protect as being legal rights, what disadvantages it will enforce as being legal duties, and what methods it will pursue in so doing.’ (*Elements of Jurisprudence*, 12th ed., p. 87.)

Something further, however, may I think well be said, and is said by Professor Jethro Brown in his *Austinian Theory of Law* (pp. 338–44):

‘To the objection that a great part of law is not expressible in the form of command one answer dwells upon what is alleged to be an undue abstraction in determining what are legal rules. “A law, like any other command, must be expressed in words, and will require the use of the usual aids to expression. The gist of it may be expressed in a sentence which, standing by itself, is not intelligible ; other sentences locally separate from

the principal one may contain the exceptions and the modifications and the interpretations to which that is subject. In no one of these taken by itself, but in the substance of them all taken together, is the true law, in Austin's sense, to be found. Thus the rule that every will must be in writing is a mere fragment—only the limb of a law. It belongs to the rule which fixes the rights of devisees or legatees under a Will. That rule, in whatever form it may be expressed, is, without any straining of language, a command of the legislator. That 'every person named by a testator in his last will and testament shall be entitled to the property thereby given to him' is surely a command creating rights and duties. After 'testament' add 'expressed in writing'; it is still a command. Add further 'provided he be not one of the witnesses to the will', and the command, with its product of rights and duties, is still there. Each of the additions limits the operation of the command stated imperatively in the first instance" (*Ency. Brit.*, vol. XIV, p. 358)... Now the position that law in its totality is essentially a system of social regulation which the State will uphold by force, is not affected by the fact that some parts of the law are not imperative, if it be true that such parts derive a practical meaning and value from parts which *are* imperative (p. 340). . . . In regarding laws as the command of the rulers to the subjects, he (Austin) gave countenance to the inference that law is the arbitrary creation of the rulers. The position at present under consideration, however, is that of law as command of the State, a totality embracing rulers and ruled. When once the conception of law as command is clearly distinguished from the representation of legal rules as the arbitrary creation of a visible ruler obeyed by subjects from fear of legal penalties, it is difficult to see on what ground the conception can be criticized. Whatever else law is, it is at least command. What makes a particular rule of conduct law, is not the fact that it may be useful, but that behind it is the majesty, the authority, and the force of the State. There are other rules of conduct which men observe under the influence of all kinds of impulse, but of the rules of conduct which are law, the distinguishing characteristic is the existence of the organized force of the community behind them. But what the community as an organized unit will enforce it may be said with justice to command.' (p. 344.)

But waiving this point as to the suitability of the word 'command' as descriptive of rules of law in general, how far can we acquiesce altogether in the statement that in order to be a law properly so called, a rule of human action must have been set or

imposed—or even that it must be enforced by the sovereign political authority in a State?

Can we acquiesce in these statements not only, in Mr. Harrison's words, 'as true for the lawyer from the point of view of formal and scientific law' as explained in the text (*supra*, p. 33); but as true as a matter of historical and actual fact?

Now that the Austinian conception of law as a command of the sovereign political authority in the State is not the old English conception of law is shown by Mr. Holdsworth (*History of English Law*, vol. ii, p. 154):

'No doubt where the King's interests were concerned the royal control was strict. But, when there was no occasion to exercise this control, the fact that the royal judges began to sit as regular tribunals at a time when the idea that the suitors of the Court were the true exponents of the law was the most usual and natural idea, cannot have been without its influence. It would naturally lead them, in ordinary cases, to regard the exposition of the law as emanating from the Court rather than as emanating from the king. They were royal judges, it is true; they were bound to obey royal commands; but they were judges making law at a time when it seemed natural that the Court should expound the law,—when *quod paribus placuit* rather than *quod principi placuit* seemed to have the force of law. It is easy to see that this idea tends to give the law a position of great independence which is quite foreign to a body of law based upon Roman ideas or Austinian analysis.'

'Historically, it would seem . . . that *judges* came before *kings* almost everywhere, as we are told they did with the Hebrew polity established in Palestine.' (Clark's *Practical Jurisprudence*, p. 154.)

And so says Professor Goadby in his *Introduction to the Study of Law* (p. 43):

'Law was the outcome of popular practice and not of the will of the sovereign. This fact is obscured to-day by the striking but modern activity of the State as a law-maker which leads men to emphasize unduly the importance of the legislator. They are apt to speak as though the law springs ready made from the law-giver's mind, and that this is its natural origin. But the history of Roman and English law and also that of Mohammedan law shows how false is this view. In none of these cases did the legislator play a prominent part. In the period during which the principles of the law were being established and worked out the legislator was strangely silent. The decisions of the Courts,

the opinions of professional writers, and the force of popular usage, each with varying importance in different countries, established rules of law and brought into being a system adapted to the needs of the community. . . . Indeed to regard law as essentially a creation of the sovereign is not only to falsify history but to make the law incomprehensible. Law can never be understood unless it is studied as a growth and its history made to explain its present condition.'

And even as to enforcement by the State being an essential element in the conception of law properly so called, the text has referred to the comments of Sir H. Maine in his *Early History of Institutions*, and to his explanation of the Austinian analysis.

Now, bearing in mind that the term 'positive' law is used to indicate not only rules of law originally formulated by the sovereign power in a State, but, also, to use Professor Holland's words, laws 'enforced', or 'authoritatively enforced', by such sovereign power even though not originally formulated by it—if Austin and Professor Holland had advanced their definitions simply as definitions of such positive law—then we might be content to say in regard to the observations of Sir H. Maine above referred to, with Mr. Justice Markby :

'What difficulty is there to solve? What Maine shows is, that in the Punjaub in the time of Runjeet Singh, the people were governed, not by positive laws, but by rules chiefly of a religious or semi-religious character, to the enforcement of which no regard was paid by the reigning monarch. But the existence of such rules neither affects Austin's conception of law in general, in which many of them are included, nor does it affect his conception of positive law or of sovereignty with which they are not concerned.' (*Elements of Law*, 5th ed., p. 8.)

But the point is that Austin and Holland go further, and say that the positive laws thus defined by them are the only laws properly so called. It seems only a matter of the use of language whether we are to content ourselves with Sir T. Erskine Holland's answer to Sir H. Maine. It in no wise affects the phenomena of law. This is what he says :

'With reference to the Western nations, we would submit that the dependence of law upon sovereignty was as obvious in Attica and Lacedaemon as it ever was under the Roman Empire. A law

as carried by Pericles, or as imagined by Plato, would conform to Austin's definition as completely as would a constitution of Marcus Aurelius. With reference to the relation of a great Oriental tax-gathering empire to the village customs of its subjects, or to the more distinctly formulated laws of a conquered province, it is necessary to draw a distinction. Disobedience to the village custom or the provincial law may either be forcibly repressed, or it may be acquiesced in, by the local authority. If it be habitually repressed by such local force as may be necessary, it follows that the local force must, if only for the preservation of the peace, be supported, in the last resort, by the whole strength of the empire. In this case the humblest village custom is a law which complies with the requirement of being enforced by the sovereign. If, on the other hand, disobedience be habitually acquiesced in, the rules which may thus be broken with impunity are no laws; and so far as such rules are concerned, the tax-gathering empire is lawless, its organization consisting merely of an arbitrary force, acting upon a subject mass which is but imperfectly bound together by a network of religious and moral scruples. It is convenient to recognize as laws only such rules as can reckon on the support of a sovereign political authority, although there are states of society in which it is difficult to ascertain as a fact what rules answer to this description.' (*Elements of Jurisprudence*, 12th ed., p. 53.)

Of this last sentence Sir Frederick Pollock observes :

'The qualification seems not quite adequate. In the states of society specified by Sir H. Maine and to this day prevailing over a large part of the earth, the difficulty is not merely to ascertain what rules of conduct be true laws, but to find any person or body answering the description of a sovereign political authority in the sense required by the analytical schools.' (*Essays in Jurisprudence and Ethics*, p. 10.)

As Professor Goadby says in his *Introduction to the Study of the Law* (pp. 30-1):

'All are agreed that law is in fact enforced by the State in modern times. But there is disagreement as to whether this enforcement is an essential characteristic of law or not. The problem may be presented in this form. Does a rule become a rule of law because it is enforced by the State, or is it enforced by the State because it is law?'

And he adds (p. 34, n.):

'With Austin's conception of law as resting upon the force of the State may be compared that of the German Jurist von Jhering :

"Law is currently defined as 'the sum total of the compulsory rules prevailing in a State', and in my opinion this is entirely correct. The two factors which it includes are the Rule and the realization of the Rule through force. Now only those social rules deserve the name of law which have behind them Force, or, since the State alone is the representative of the compulsory power of the Society, the Force of the State. And this fact involves the conclusion that only those rules which are thus made effectual by the State are rules of law, or, changing the phrase, that the State is the only source of law" (*Der Zweck im Recht*—Purpose in Legal Development—4th ed., ch. viii, p. 249).'

The phenomena of law which have been referred to as antagonistic to the conception of Austin and Holland as to what alone are laws properly so called, are perhaps nowhere more strikingly illustrated than by what Lord Bryce tells us about Iceland, in one of his Essays in *Studies in History and Jurisprudence* (vol. i, pp. 332-7). I will quote only a few sentences, referring the reader to the Essay as a whole. He says:

'The few laws or resolutions of general concern which the Althing passed' (the first Althing or general Assembly of all Iceland met in A.D. 930—one of the oldest national Assemblies in the civilized world)—'they were few, because its legislative activity was chiefly occupied in regulating its own judicial proceedings,—were probably meant to be accepted and observed over the whole island, but the Althing did not attempt to enforce them, and indeed had no machinery by which it could do so. . . . The Republic, if we may so call it, had no Executive whatever. . . . The Icelandic Republic was in fact a government developed only upon its judicial and (to a much smaller extent) upon its legislative side, omitting altogether the executive and international sides, which were in the Greek and Roman world, and have again in the modern world, become so important. . . . Some modern theorists derive law from the State, and cannot think of law as existing without a State. A few among them have in England gone so far as to deny that Customary Law is law at all, and to define all Law as a Command issued by the State power. But here in Iceland we find Law, and, indeed (as will appear presently), a complex and highly developed legal system, existing without the institutions which make a State; for a community such as has been described, though for convenience it may perhaps be called a Republic, is clearly not a State in the usual sense of the word. Of Iceland, indeed, one may say that so far from the State creating the Law, the Law created the State—that is to say, such State organization

as existed came into being for the sake of deciding lawsuits. There it ended. When the decision had been given the action of the Republic stopped. To carry it out was left to a successful plaintiff; and the only effect a decision had, so far as the Courts were concerned, was to expose the person resisting it to the penalties of outlawry—that is to say, any one might slay him, like Cain, without incurring in respect of his death any liability on the footing of which his relatives could sue the slayer. Law in fact existed without any public responsibility for enforcing it, the sanction, on which modern jurists so often dwell as being vital to the conception of law, being found partly in public opinion, partly in the greater insecurity which attached to the life of the person who disregarded a judgement. Yet law was by no means ineffective.’

And Sir Frederick Pollock adds light to the subject in his *First Book of Jurisprudence*, pp. 23–4, 27 :

‘We find preserved among the antiquities of legal systems, and notably in archaic forms and solemnities, considerable traces of a time when the jurisdiction of Courts arose only from the voluntary submission of the parties : and this not only as between subject and subject, but as between a subject and the State. We need not doubt that effectual motives for submission could be brought, sooner or later, to bear on unwilling subjects. The man who did not submit himself to law could not claim the benefit of the law ; there was no reason why every man’s hand should not be against him. Outlawry, now all but obsolete even in name, was the formal expression of the archaic social rules by which law was gradually made supreme. . . .

‘Various causes have made it possible and even plausible to regard law not only as being embodied in the commands of a political sovereign, but as consisting of such commands and being nothing else. They have not altered the fundamental facts of human society ; and the merely imperative theory of legal institutions remains as one-sided and unphilosophical as it was before. Law is enforced by the State because it is law ; it is not law merely because the State enforces it.’

Another objection, however, to Austin’s and in a lesser degree to Holland’s definition of law is that they suggest that force and fear are the source of obedience to law. But as Lord Bryce says :

It is not primarily or chiefly Fear which is the source of Obedience. It is not Physical Force that has created the State whence (according to this doctrine) laws issue and by which they are applied. It is not through Force that kings reign and princes decree justice. According to the Hebrew Scriptures it is by God that

they reign. According to Homer it is Zeus who has given to the king the sceptre and the dooms, that therewith he may rule. Both expressions convey the same truth, that it is by the natural or providential order of things, and in virtue of the constitution of man as a social being, that men are grouped into communities under leaders who judge among them. The tendency to aggregation, to imitation, to compliance and submission, is the basis on which the State is built. . . . Where a ruler rules by pure force (apart from the consent of the community) he is what the Greeks call a Tyrant, or the Italians in the fourteenth century a Signore, a Usurper reigning in defiance of law by means of armed men, an Adventurer who has risen by a revolution, is supported by the soldiery, and will fall when they turn against him. . . . The Benthamite definition is perceived to be unsound. These curt and often sweeping definitions usually are unsound. They are not simple, although they are summary. They are arbitrary and artificial, concealing under few words many fallacies. Human nature and human society are too complex to be thus dealt with.' (*Studies in History and Jurisprudence*, vol. ii, pp. 47-8.)

Mr. J. Neville Figgis in the *Cambridge Modern History* (vol. iii, pp. 745-9) has a long and illuminative passage in connexion with this subject, of which I may quote the opening sentences :

'Another aspect of the modern State is the irresistible force at its disposal. To us it appears a necessary attribute of any government that it shall be able to compel practically universal obedience. Force is at the back of all law and every private right ; so much is this the case that it seems to us inseparable from the idea of law. The modern mind is not disposed to admit the existence of any legal right or duty, either public or private, which cannot be enforced by compulsion. But this is quite a new conception. It is the result of the struggles of the Middle Ages and of the movements, political and religious, of the sixteenth and seventeenth centuries. Indeed, the recognized need of such a power became the great support of tyranny. Long periods of impotence generated a belief in the Divine origin and necessity of political power. In the modern world government is occupied in administering the law and adapting it to fresh needs. In the Middle Ages it was occupied with a struggle for its own existence. "In the older feudal monarchy, not only was the monarch at no time sovereign, but neither was the State." Slowly, indeed, but surely, local franchises disappeared, private war diminished, and there came to be recognized a central authority giving force to a general system of law. The very fact of the "reception" of Roman law in continental countries in the fifteenth century shows how foreign to the actual life of the day was a uniform system of

common law. Such law as existed was the outcome of local, feudal, or national custom rather than of the will of any law-giver.'

And again, speaking of the Middle Ages, he says :

'To those who saw in law, not the success of effectual rulers, but the transient effort at social improvement or the recognition of principles of action,—even to those who looked upon it merely as the decision of a Court, interpreting immemorial custom, another view than the modern notion of positive law was a necessity. They discerned in legal rules, not the authority of the governor, but his purpose : namely justice, which is a shadow of the Divine nature. In its promulgation they perceived not a sovereign act, but a personal revelation. To those holding such views law, in so far as it is something beyond the mass of customs which bind society together, is not a command ; it is a discovery. In other words, there are certain truths about human nature in society which are eternal and independent of immediate circumstances. Law is the expression of the fact that human history is not merely the record of a hand-to-mouth existence but embodies principles.'

ANNOTATION II

DEFINITIONS OF LAW

THE question of the proper or best definition of law is one which has exercised many minds. Austin's and Holland's definition have already been discussed (*supra*, p. 150). We have in the text Mr. Harrison's, which, it is submitted, cannot be improved upon as a definition of private law as distinguished from constitutional law.

'Law is a general rule respecting the property, person, reputation, or capacity of the citizens of a State, which the sovereign power therein will cause to be observed by the authority it delegates to its tribunals' (or, 'will enforce in its tribunals').

It may, however, be of use to the student to say something of other definitions which have been advanced.

Professor E. C. Clark, in his *Practical Jurisprudence: A Comment on Austin*, after discussing the 'unconscious definitions' of law involved in the use of the oldest and simplest names by which that conception has been expressed in Latin, Greek, Anglo-Saxon, and Sanskrit, as well as conscious definitions framed at

a far later period by philosophers or lawyers, and what people in general have understood and do now understand by law, arrives at the following as his own definition :

‘The law of a State is the aggregate of rules administered mediately or immediately by the State’s supreme authority, or regulating the Constitution and functions of that supreme authority itself: the ultimate sanction being, in both cases, disapproval by the bulk of the members of that State.’ (p. 172).

This he considers gives the essentials in the law of a State or political society as ordinarily apprehended. And he adds by way of explanation :

‘In the case of *national*, or, in the wider Roman sense, *civil* law—i. e. the rules of conduct obtaining between members of one nation, State, or political society,—I have endeavoured to show the necessity of recognizing as *ultimate* sanction, the *general* disapproval of the society and its consequences. . . . The regulations of sovereign power depend for their sanction upon a general disapprobation and its results: there is no difference in kind between them and the laws of fashion, honour, or received morality, but it were obviously, at least in modern times, an absurdity to class all together. In the first place, Constitutional law deals with a different and very special subject-matter. In the second, the number likely to disapprove of its infractions, and the extent to which their disapproval is likely to go, are infinitely greater. . . . The regular administration of law by sovereign power casts into the shade all “rules of opinion” but such as relate to that of power itself. This is the reason, apart from difference of subject-matter, why, in speaking of *law* in the language of ordinary people, we should not naturally include those rules of morality, etiquette, or honour, which are of comparatively limited efficiency ; but we should include those rules of Constitutional and International law, the sanctions of which are graver in their character, more certain to be incurred, and, when incurred, more difficult of evasion. The difference is one of practice, not of strict definition : both classes of rules are *properly* called law, but the former class does not now come within the general acceptation of the term by people who have to deal with facts rather than with logic.’

The Oxford Dictionary defines ‘Law’ as follows :

‘The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects.’

Professor Salmond deals with the subject very suggestively in his *Jurisprudence*. He there tells us that we must distinguish between *a* law and *the* law,—between law in the concrete sense and law in the abstract sense.

‘A law means a statute, enactment, ordinance, decree or any other exercise of legislative authority. It is one of the sources of law in the abstract sense. A law produces statute law, just as custom produces customary law, or as precedent produces case law.’ ‘*The* law is the body of principles recognized and applied by the State in the administration of justice; or, more shortly: The law consists of the rules recognized and acted on in Courts of Justice.’ ‘The distinction demands attention for this reason, that the concrete term is not co-extensive with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws but rules of law or legal principles. . . . Most English writers have, in defining law, defined it in the concrete, instead of in the abstract sense. They have attempted to answer the question: “What is a law?” while the true inquiry is: “What is law?” The central idea of juridical theory is not *lex* but *ius*, not *gesetz* but *recht*. . . . This consideration of laws instead of law tends almost necessarily to the conclusion that statute law is the type of all law and the form to which all of it is reducible in the last analysis. It misleads inquirers by sending them to the legislature to discover the true nature and origin of law, instead of to the Courts of Justice. It is consequently responsible for much that is inadequate and untrue in the juridical theory of English writers.’ (5th ed., pp. 9–10.)

A little farther on Professor Salmond says:

‘If there are any rules prior to, and independent of the State, they may greatly resemble law; they may be the primeval substitutes for law; they may be the historical source from which law is developed and proceeds; but they are not themselves law. . . . The historical point of view is valuable as a supplement to the logical and analytical, but not as a substitute for it. . . . The plausibility of the historical argument proceeds from the failure adequately to comprehend the distinction between the formal and material sources of law. Its formal source is that from which it obtains the nature and force of law. This is essentially and exclusively the power and will of the State. Its material sources, on the other hand, are those from which it derives its material contents. . . . If any rule of conduct has already put on the true nature, form, and essence of the civil law, it is because it has

already at its back the power of the organized commonwealth for the maintenance and enforcement of it.' (Ibid., pp. 50-1.)

Professor Jethro Brown, in his *Austinian Theory of Law* (pp. 344-8), contributes the following to the discussion of the proper definition of 'law':

'Law, in its totality, is the voice of the organized community speaking to all persons subject to its control, and affirming a rule of life which men may accept with the consciousness of the might of the community to support them. It is the expression of the organized will of the community, backed by the organized force of the community. Particular rules of law may not be expressible in the imperative form; but such rules derive their meaning and value from their association with a system which, regarded as a whole, must be held to be commanded—if once the term command be defined in the manner which popular usage and common sense require. In such familiar descriptions of law as the empire of the dead over the living, as the product of national life, as a spirit which lives and moves with the letter, we may recognize dimly the presentation of great truths which should be reflected in the definition of law. I will venture, accordingly, to urge for the inclusion of three further elements in the conception of law in addition to those to which reference has been made. The sum of the rules which go to make law is a *unity*; it is unity which is also a *growth*; it is a growth which is also something distinguishable from a mere natural product, being in fact an expression of human intelligence and design—"a growth directed by conscious foresight".'

And he adds by way of explanation:

'Particular rules of law cannot be interpreted as if they were detachable fragments of an atomic or mechanical whole. To explain their meaning we must regard them alongside of other rules of law which qualify or extend their scope and regulate their enforcement. . . . Existing rules of law change in their meaning from age to age by slow, insensible processes, and additions or alterations of the law are no mere patchwork. The most despotic of legislators cannot think or act without availing himself of the spirit of his race and times. His most despotic laws reveal the influence and potency of that spirit. When they are once promulgated they have to be interpreted and administered; in the process of interpretation and administration, the spirit of the legal system as a whole will reassert itself at every stage; between the rule and the legal system vital relations become established;

and if we are to describe the change in the legal system we must call it a growth, not in the mechanical sense conceived by Austin, but in the living sense in which we employ the term when describing the developmental processes which are characteristic of organic nature.'

ANNOTATION III

BENTHAM AND AUSTIN'S ANALYSIS OF LAW

JURISPRUDENCE

IN this chapter Mr. Harrison indicates his view of the true meaning of 'Jurisprudence or the science of law' by his statement (*supra*, p. 63) that, 'The object of Jurisprudence is not to teach the actual rules of practice. Its object is to supply sound ways of grouping these rules, and a scientific conception of their relations and proper ends.' I think, however, it may be of service to the student to add here some remarks upon the general subject of 'Jurisprudence'.

(1) First, then, what is the meaning and content of 'Jurisprudence' in that sense in which it is used to signify 'the science of law'?

This use of the term indicates in the first place a certain science. What then constitutes a 'science'? As a recent writer says:

'Merely to collect a number of facts is not to evolve a science. A man does not know anything about the science of political economy, for example, if he merely knows that the price of a certain commodity has risen. He must not merely know that there has been a rise of prices, he must find out the principles which underlie and explain that rise of prices—the law of supply and demand, and the like. Before a science can be produced facts must be co-ordinated, the logical relations existing between them must be found out, the principles underlying them must be discovered. Science is not merely knowledge; it is the systematization of knowledge. Unless the student grasps this point, he will never rightly understand the meaning of the word "Jurisprudence".' (Eastwood's *Introduction to Austin's Jurisprudence*, p. 3.)

But when we say that 'Jurisprudence'—in the only sense in which the analytical jurists, such as Austin and Holland, consider that the word should be used—is a science, we mean something more than that it is knowledge co-ordinated, arranged, and systematized, to quote a dictionary definition of a 'science'. We mean, further, that the legal phenomena which are its subject-matter may be traced, and are by it traced, to ultimate laws of human nature; and that, to adapt the language of Professor Holland (*Jurisprudence*, 12th ed., p. 10), its generalizations will hold good everywhere by virtue of the fact that these legal phenomena possess everywhere the same characteristics.

The only sense in which the term 'Jurisprudence' can properly be used, according to the analytical jurists, is to indicate the analytical science of law—'analytical jurisprudence' as it is usually called—and it may be defined, as by Professor Holland, as 'the formal science of positive law'. The meaning of the term 'positive' as applied to law has already been explained (*supra*, p. 156); and this definition is equivalent to saying that this analytical jurisprudence is the formal science of 'law' as the term is understood in such nations as those of modern Western Europe.

What, then, does this science of positive law consist of, what does it aim at teaching us, and what does it accomplish?

Austin replies that Jurisprudence, or, as he prefers to call it, 'General Jurisprudence', is 'the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law; understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction'; and again:

'The proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such subjects and ends of law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.' (*Lectures*, 4th ed., vol. ii, pp. 1108, 1112.)

But Austin gives us no clear understanding of the contents of

Jurisprudence, nor shall we get one until we realize that all 'notions and distinctions' of law are notions or distinctions about different relations with each other into which men are born, or grow, or enter by some form of voluntary transaction, or are placed in by the law itself; and the distinctions between these relations and between rights and obligations implied in, arising from, or otherwise attached to them. Law is concerned only with relations between persons, and such relations may be between one or more individuals and people in general, as, for example, the relation between a man who owns a certain piece of property and people in general who do not own it; or they may be between one or more individuals and one or more other individuals, as, for example, relations arising out of contract, or the relation which arises between one who has done another an injury and the man he has injured. The subject of Jurisprudence is such of these relations as the law recognizes by attaching rights or obligations to one or other or both the parties, to them; and the general character of such rights and obligations. These relations, and the ideas involved in the very conception of them, and the purpose of regulating them, are the common element in all mature systems of law. Professor Holland brings this out very clearly. Jurisprudence, he tells us, is 'the formal science of those relations of mankind which are generally recognized as having legal consequence' (*Jurisprudence*, 12th ed., p. 9); or, again, Jurisprudence, he says, 'is a formal, or analytical, as opposed to a material science; that is to say, it deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations' (*ibid.*, p. 6).

Thus the right of an owner of a piece of land to take possession of it, and the right of a leasehold tenant of a piece of land to take possession of it, are, regarded in detachment, the same kind of rights. Each is a right to take possession of land. But we do not find them classified together by Professor Holland. Why? Because they are the legal consequence of, and arise out of, two quite different relations. The one arises out of the relation between a man who owns a piece of property and people in general. The other arises out of the relation between lessor and lessee under a contract of lease.

So quite consistently with his definition of Jurisprudence, what Professor Holland really distinguishes between are the various relations between men generally recognized in mature systems of law ; and legal rights are only distinguished by him as arising out of, or being 'the legal consequence' of, distinct relations.

Thus the subject-matter of Jurisprudence being the various relations between human beings and the conceptions involved in the comprehension of these relations, how does it treat this subject-matter and what does it do with it? It enumerates and defines these relations, and classifies them according to a rational and logical method ; it defines the conceptions involved in them and in the legal consequence, i.e. the rights and obligations following upon them, such as 'right', 'duty', 'remedy', 'ownership', 'contract', 'possession'; and it indicates, in connexion with each, the general character of those legal consequences.

Professor Dicey apparently agrees with those who would confine the word 'Jurisprudence', or at all events confine its study, to this analytical science of positive law. He says :

'Jurisprudence, in the only sense in which it is worth the attention of any sensible man, has nothing idle, unmeaning, or pedantic about it, but is an analysis of the different conceptions or ideas, such as the idea of a "right", of "possession", of "property" and the like, to be found in all actual legal systems ; and is also an account of the relation of such conceptions to each other, and hence of the heads or divisions under which a system of law *may* be properly distributed.' (*Law Magazine*, vol. v, p. 382.)

And Professor E. C. Clark says :

'The main object, in fact, of calling Jurisprudence a science, is to distinguish it from the Art which relates to the same subject-matter. As a science, then, Jurisprudence deals rather with the general principles, notions, and distinctions of law than with their application to individual cases, or their embodiment in detailed rules.' (1 *L. Q. R.* 203.)

And Professor Holland illuminates the matter when he adds :

'The assertion that Jurisprudence is a formal science may perhaps be made clearer by an example. If any individual should accumulate a knowledge of every European system of law, holding each apart from the rest in the chambers of his mind, his achievement would be best described as an acquaintance with

the legal systems of Europe. If each of these systems were entirely unlike the rest, except when laws had been transferred in the course of history from one to the other, such a distinguished jurist could do no more than endeavour to hold fast, and to avoid confusing, the heterogeneous information of which he had become possessed. Suppose, however, as is the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods, and ideas common to every system of law. Such a scheme would be a formal science of law; presenting many analogies to Grammar, the science of those ideas of relation, which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind.' (*Jurisprudence*, 12th ed., p. 7.)

(2) Such, then, being the subject-matter of analytical Jurisprudence, and the way it aims at dealing with this subject-matter, what is the value of it all? What would we gain from such a science, if perfected, apart from the practical object of the consolidation and systematization of English or any other particular system of law, or the ultimate and final codification of such a system, to which Mr. Harrison refers in the text. In the first place we should have arrived at an accurate analysis, explanation, and, consequently, apprehension of the terms which lawyers have to use, and the conceptions with which they deal; and as Austin himself somewhere says: 'It really is important that men should think distinctly and speak with a meaning.' And in the second place we should have a logically consistent and complete ground-plan of the whole field of law, enabling us, as it were, so to arrange our stores of knowledge of the actual rules of law, as we accumulate them, as to make our minds, aided by association of ideas, more retentive of them; and to render them more accessible to our memories when occasion arises to recall them, and the value of this is not detracted from by the fact that in dealing with the legal aspects of some particular department of human affairs or business, we may have to do with relations occupying different portions of the field.

As Mr. Harrison himself says (*supra*, p. 91): 'If it be possible to reduce the wilderness of rules which the vast library of text-

books presents to a coherent body of general conceptions the usefulness of it as an introduction to the study seems too obvious for agreement.'

(3) Such is the science of law in the only sense which Professor Holland would dignify by the name of Jurisprudence. It is more usual, however, to distinguish it as 'analytical Jurisprudence', or 'general Jurisprudence'. For in truth, the phenomena of law may be regarded from more than one aspect; and there are other such aspects, which, although they may be looked upon as ancillary to analytical Jurisprudence, and although in his chapter on 'Historical Jurisprudence' (which I shall refer to again presently) Mr. Harrison says (*supra*, p. 86), 'The historical method is one of the resources of Jurisprudence, not the substantive part of it, and in no sense an independent part of it', yet are in themselves so fundamentally different from that in which analytical Jurisprudence regards them, that they may well be said to be other kinds of legal science—or, more properly, to constitute other fields, or departments, of the whole science of law—and, therefore, usage at all events claims them to be equally entitled to the name of 'Jurisprudence'. Thus instead of considering the phenomena of law as they now exist in the maturer systems, we may apply ourselves to consider law in its development, and to arrive at such generalizations as may be discoverable concerning the growth of law. Hence arises what is generally termed 'Historical Jurisprudence'. With that, however, I propose to deal more particularly in the annotation to Chapter III of Mr. Harrison's text, wherein he treats of the Historical Method. It may, however, be remarked here that historical Jurisprudence, as treated in Sir Henry Maine's famous works on *Ancient Law*, *The Early History of Institutions*, *Village Communities in the East and West*, and *Early Law and Custom*, may be equally well termed 'Comparative Jurisprudence' in one of the uses of that elastic term. Professor Jethro Brown, indeed, calls Analytical Jurisprudence itself one kind of Comparative Jurisprudence. He says:

'The term Comparative Jurisprudence may be used in at least three distinct senses. In the first sense the term may indicate a study of which the avowed object is to discover a law common

to various nations,—a body of legal rules which are alleged to exist in a number of different civilized communities and which, by virtue of this existence, are assumed to possess a permanent value. The idea is that of a *ius gentium*, as that term has been frequently interpreted. Such a system of rules suggests an obvious parallelism to the Law of Nature of *a priori* philosophy. There are, however, two important differences. A *ius gentium* postulates neither immutability nor universality. It may grow with the growth of the different national systems from which it is drawn; and for the test of universality, it substitutes that of generality. In a second sense, Comparative Jurisprudence may be identified with the General Jurisprudence of Austin, *i. e.* as the science of the notions, principles, and distinctions, common to the various systems. . . . This is also the sense of the term Jurisprudence as defined by Professor Holland: "Jurisprudence is not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences." In a third sense, Comparative Jurisprudence may indicate, not a science of the law in general, but any investigation of a particular legal topic which attempts to show how that topic is dealt with in two or more legal systems. The object of such an investigation may be to discover hints for the reform of law, or for the interpretation of law.' (*Austinian Theory of Law*, pp. 359–60.)

Lord Bryce's conception of what he speaks of as the comparative method of the science of law in an Essay on *The Methods of Legal Science* seems to combine the first and third of the senses in which Professor Jethro Brown speaks of 'Comparative Jurisprudence'. He then says:

'The comparative method is concerned with space as the Historical method is with time. . . . It seeks to construct a system which shall be Natural because it embodies what men otherwise unlike have agreed in feeling to be essential; Philosophical because it gets below words and names and discovers identity of substance under diversity of description, and Serviceable because it shows by what particular means the ends which all (or most) systems pursue have been best attained. The process is something like that which a Roman praetor might have followed in constructing the general or theoretical part of his *ius gentium*.' (*Essays*, vol. ii, pp. 186–7.)

Lastly, Professor Jethro Brown describes yet another kind of science of law—or, as I would prefer to call it, another depart-

ment, or field, of the science of law—which is worthy of all attention ; and, incidentally, discovers a legitimate use of the expression ‘Particular Jurisprudence’, a phrase to which Professor Holland does not object if applied to an analytical science of law derived from one particular system ; but says one might as well speak of a ‘particular science of Geology’ in reference to a science of Geology derived from an observation of the strata in England only (*Jurisprudence*, 12th ed., p. 10).

Professor Jethro Brown says :

‘The science of which the student is most in need appears to me to be Particular or National Jurisprudence. . . . “I must confess to a certain feeling”, writes Lightfoot, “that law is meant to serve the interests of the people, and that no treatment of it can be called scientific which does not show how it contributes to this end. As long as we take our distinctions solely from English law and explain them merely by history, we do not enter upon science, for the distinctions and principles may be merely accidental, and the historical reasons may have no reference to utility. If, however, we were to show that these distinctions and principles have a real basis in the wants of the people, we should then treat the law scientifically, and we should work out the Particular Jurisprudence of the country” (*The Nature of Positive Law*, p. 11). Two ways of regarding the ends which law serves have alike a sound justification in fact. The one we may call the economic, the other ethical. According to the economic view, the purpose of law may be expressed as the discovery of the conditions under which man adapts himself to his environment in so far as those conditions are maintainable by the organized force of a political society ; the predominant and determining factor in the development of law must be sought in man’s constant endeavour to respond to the pressure of economic facts, to discover some way of realizing his will to live ; laws, in a word, are what economic necessities have made them. According to the ethical view, the purpose of law is to realize man’s idea of the just. Although what is just may be difficult for him to determine, yet to know the just, and to do it, is his mission. Whether justice be regarded as something divinely revealed to man ; or as something absolute, immutable, superior to contingencies of fact, and determinable by some *a priori* process of reasoning ; or again, as something whose meaning and nature are being revealed in the long course of social evolution and so to be determined by the analysis of human experience,—in either of these cases we are confronted by the fact of an ideal of justice to

which it is held to be the mission of law to confirm. "Justice is," said Carlyle, "whether I can define it or not. . . ." It may be inferred from what has been said, that to see law steadily and see it whole is a somewhat toilsome business. Sociology, ethics, politics, legislation, and political economy suggest a range of studies which is too wide to be within the possibilities of a course of legal study. The law student will say, "All this is too wonderful for me; I cannot attain unto it." Probably he will be right. Here, as elsewhere, he may find it necessary to content himself with a compromise. National jurisprudence should endeavour to aid him in achieving this compromise. Each of the sciences to which I have referred has its own special view of law. A National Jurisprudence cannot hope to rival those sciences within their own special sphere. Yet by their aid it may succeed in presenting such a view of law and of the fundamental principles and conceptions of law as will enable the student to realize in his subject a new life and meaning, to get nearer that spirit which saves from the despotism of the letter.¹

ANNOTATION IV

THE HISTORICAL METHOD (CHAPTER III)

INSTEAD of considering the phenomena of law as they now appear in the maturer systems, we may apply ourselves to consider law in its development, and to arrive at such generalizations as may be discoverable concerning the growth of law in general and of separate legal institutions. Hence arises a science of legal development, and it constitutes what is called historical jurisprudence, although, as already stated, it also may be, and often is, included in the term Comparative Jurisprudence. Now the first thing to do is to distinguish the legal history from this Historical Jurisprudence, and, perhaps, this cannot be better done than in the words of Professor Jethro Brown in his *Austinian Theory of Law* :

¹ As to what may be termed the 'Metaphysical Method' of Jurisprudence the student may be referred to Lord Bryce's essay in *Studies in History and Jurisprudence*, vol. ii, pp. 176-7.

‘Legal history affects to describe the actual development of law as it has been at the different periods of the national history. Historical Jurisprudence should state, as far as may be, the moral, social, and economic causes which account for that development. The one answers the question “How?”; the other seeks to find some answer to the question “Why?”. The one describes legal development; the other explains it. The one regards the development of the law more or less in isolation; the other is compelled to bring that development into relation with the general progress of the national life.’ (*Austinian Theory of Law*, p. 358.)

Professor Vinogradoff has dealt with the whole matter most lucidly and suggestively in his article on Comparative Jurisprudence in the *Encyclopaedia Britannica* (*sub voc.* Jurisprudence, Comparative). I can do little more than refer the student to the article. In the course of it, however, he says:

‘The comparative study of law may be treated in two different ways: it may be directed to a comparison of existing systems of legislation and law, with a view to tracing analogies and contrasts in the treatment of practical problems and taking note of expedients and of possible solutions. Or else it may aim at discovering the principles regulating the development of legal systems, with a view to explain the origin of institutions and study the conditions of their life. . . . In the second sense, comparative jurisprudence is one of the aspects of so-called sociology, being the study of social evolution in the special domain of law. . . . Comparative Jurisprudence, as understood in these introductory remarks, dates from the nineteenth century, and especially from its second half. . . . The historic bent of mind of nineteenth-century thinkers was to a great extent the result of heightened political and cultural self-consciousness. It was the reflection in the world of letters of the tremendous upheaval in the States of Europe and America which took place from the close of the eighteenth century onwards. . . . It is not a matter of chance that the *historical school* of jurisprudence, Savigny’s doctrine of the organic growth of law, was formed and matured while Europe collected its forces after the most violent revolutionary crisis it had ever experienced, and in most intimate connection with the romantic movement, a movement animated by enthusiastic belief in the historical, traditional life of social groups as opposed to the intellectual conceptions of individualistic radicalism. On the other hand, the nineteenth century was a scientific age and especially an age of biological science. . . . Of course it ought not to be disregarded that the application of

scientific principles and methods to human and social facts was made possible by the growth of knowledge in regard to savage and half-civilized nations called forth by the increased activity of European and American business men, administrators and explorers. . . . The immediate incitement for the formation of comparative jurisprudence was given by the great discoveries of comparative philology. . . . It was natural that students of religion, of folk-lore, and of legal institutions took up the same method and tried to win similar results. . . . The comparative study of the Aryan group assumed another aspect in the works of Sir Henry Maine. He did not rely on linguistic affinities, but made great use of another element of investigation. . . . His best personal preparation for the task was that he had not only taught law in England, but had come into contact with living legal customs in India. For him the comparison between the legal lore of Rome and that of India did not depend on linguistic roots or on the philological study of the laws of Manu, but was the result of recognizing again and again, in actual modern custom, the views, rules and institutions of which he had read in Gaius or in the fragments of the XII Tables. . . . In regard to jurisprudence Steinmetz distinguishes carefully between art and science: "Jurisprudence in the wider sense is an art, the art of framing rules for social intercourse in so far as these rules can be put into execution by the State and its organs, as well as the art of interpreting and applying these rules. In another sense it is pure science, the investigation of all consciously formulated and actually practised rules, and of their conditions and foundations, in fact, of the entire social life of existing and bygone nations, without a knowledge and understanding of which a knowledge and understanding of law as its outcome is, of course, impossible." In this sense, Jurisprudence is a part of ethnology and of the comparative history of culture. But in order to grapple with such a tremendous task comparative jurisprudence has not only to call to help the study of scattered ethnological facts . . . ethnological studies themselves have to look for guidance to psychology, especially to the psychology of emotional life and character. Although these branches of psychological science have been much less investigated than the study of intellectual processes, they still afford material help to the ethnologist and the comparative jurist; and Steinmetz himself made a remarkable attempt to utilize a psychological analysis of the feelings of revenge in his *Origins of Punishments*. . . . Organizing thought always seeks to substitute order for chaotic variety. Observations as to disconnected analogies lead to attempts to systematize them from some comprehensive point of view. These attempts may take the shape of a theory of *consecutive stages* of development.

Similar facts appear over and over again in ethnological and antiquarian evidence, because all peoples and tribes, no matter what their race and geographical position, go through the same series of social arrangements. This is the fundamental idea which directed the researches of Maine, McLennan, Morgan, Post, Kohler, although each of these scholars formulated his sequence of stages in a particular way.'

'To see law steadily and see it whole is a somewhat toilsome business. Sociology, ethics, politics, legislation, and political economy suggest a range of studies which is too wide to be within the possibilities of a course of legal study.' (Jethro Brown's *Austinian Theory of Law*, p. 374.)

As to Savigny, in his *Essay on German Schools of History* Lord Acton says (*Historical Essays and Studies*, pp. 346-7):

'Savigny developed the historic method of jurisprudence. The sovereign legislator is not the government, but the nation. Law, like language, proceeds from its primitive nature and its experience and is part of its identity. The deliberations of law-giving consist in ascertaining not what is best, but what is consistent with usage. Laws are found, not made, for the treatment adapted to successive emergencies is already latent in the public conscience, and must be evolved from precedent. Laws and constitutions expand by sustenance drawn from the constant and original spring; the force preparing the future is the same that made the past, and the function of the jurist is to trace and obey it faithfully, without attempting to explain it away. It is in Savigny's (1779-1861) works that the comparison between law and language is completely set forth. . . . Law cannot be fashioned to suit the legislator's fancy. . . . According to Savigny, it cannot be admitted that law in its origin depends either upon chance or human choice. Fact contradicts this. Every time a legal problem is solved we find ourselves in the presence of completely formed legal rules. So it is impossible to say that law was created by the will of the separate individuals who compose a people. On the contrary, it must be considered as a product of the people's genius manifesting itself in all the members of the people and leading them thus to the notion of law. . . . The fact that in our consciousness the notion of positive law is always connected with that of necessity, which would be impossible if law were a creation of our free-will, testifies in favour of a formation of law in which the will has no part. . . . Wherever we see men living together we see them forming a spiritual unity. This unity manifests and declares itself in the use of a common language. Law forms a part of this spiritual unity, since in the

popular spirit with which everybody is permeated there is manifest a force capable of satisfying the need for regulation of this common life of men. In conceiving the people as a unity, we must not only think of living members of the existing generation; the spiritual unity embraces also successive generations, the future and the past. Law is preserved in the people by force of tradition which establishes and maintains itself because the succession of generations does not take place rapidly and at a stroke, but regularly and insensibly.'

Professor Jethro Brown, however, in his *Underlying Principles of Legislation* (pp. 138-9) sounds a note of warning in respect to Savigny, saying:

'Savigny, upholding the organic theory of legal development, represented law as a product of the national life. So far from being the mere fiat of an arbitrary legislator, law was the spontaneous and unconscious expression of the juridic sentiment of a people. In other words, while he proved once and for all that law was growth in a very real sense, he committed the fatal error of underestimating the importance of the element of conscious direction on legal evolution. Juridic sentiment, wrote Ihering, in criticism of Savignian theory, has not created the law: it is law that has created the juridic sentiment. Nature has not made herself the directress of man. She has given him wants and the intelligence to meet them. The history of law is that of human thought, conscious of the end it seeks and directed towards the practical realization of the conditions of human life. In this sense, all law on earth has been made. If it appears as spontaneous it is only because we cannot discover the successive phases of its origin. This may seem at first to be a reversion to the theory of manufacture. But Ihering fully adopted this view of Savigny that law was a product of national life. In so doing he was, of course, impelled to recognize that legal development is only a phase of social development in general, and is, therefore, like it, a growth. But he corrects and completes the theory of Savigny by showing that law is a growth of a very special kind which can only be interpreted in terms of mind.'

And now as to Sir Henry Maine, it will be well, I think, to give first, in his own language, the object and theory of his researches:

'If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which

law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence. The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the latter stages of jurisprudence.' (*Ancient Law*, pp. 2-3.)

In his *Notes to Maine's Ancient Law* (Introd., pp. vii-ix) Sir Frederick Pollock says:

'We are astonished by the studiously modest terms in which Maine defined his own undertaking: "The chief object of the following pages is to indicate some of the earliest ideas of mankind as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." . . . In the height of his mature fame he described *Early Law and Custom* only as an endeavour "to connect a portion of existing institutions with a part of the primitive or very ancient usages of mankind, and of the ideas associated with those usages". . . . He did nothing less than create the natural history of law. He showed, on the one hand, that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters; on the other hand, he made it clear that these processes deserve and require distinct study, and cannot be treated as mere incidents in the general history of the societies where they occur.'

In another place Sir Frederick Pollock says:

'If there is anything we have learnt from Sir Henry Maine, it is that intimate alliance between comparative and historical research is not only natural and desirable, but necessary for either branch of work being efficiently done. If there is any book to which a modern teacher would point as a typical example of what is meant by comparative jurisprudence, it is Maine's lecture on *Village Communities in the East and West*. . . . Comparison of institutions is profitable only when we take account of the stage of civilization and of special development to which the

terms to be compared belong. The mere order of time has next to nothing to do with it. . . . The transformation of political science about forty years ago cannot be disconnected from the all but simultaneous putting forth of new and far-reaching ideas in the study of organic nature. *Ancient Law* and *The Origin of Species* were really the outcome, in different branches, of one and the same intellectual movement—that which we now associate with the word Evolution. . . . There is a normal course of development for communities as well as for individuals, and institutions which belong to different stages are not commensurable terms in any scientific comparison.’ (Article on Comparative Jurisprudence in *Journal of Comparative Legislation*, vol. v, pp. 75-83.)

PRINTED IN ENGLAND
AT THE OXFORD UNIVERSITY PRESS

Author Harrison, Frederic

Title On Jurisprudence and

DATE.	
Dec 5/21	Fowler, J
Mar 3/22	Spencer, S
30. X. 28	Randall
15. X 1. 28	Levy, J
18, II, 29	Germany